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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

NOVEMBER TERM, 1891,

AND

NOVEMBER TERM, 1892.

BY

PHARES COLEMAN.

STATE REPORTER.

VOL. XCIX.

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RULE OF CHANCERY PRACTICE.

It is ordered by the court that Rule 4 of Chancery Practice, published in 95 Ala., p. viii, be amended so as to read as follows:

4. WHEN REGISTER GRANTS ORDERS.—Decrees and orders may be applied for before the register every Monday. This rule shall not apply to orders for the issuing of writs of *ne exeat* and equitable attachments, and for the sale of personal property levied on, and orders of publication against non-resident defendants, in granting which, the register shall not be restricted to Mondays.

If the register should not get through with the business before him on any rule day, he may continue his sittings from day to day until such business is disposed of.

This rule, as thus amended and adopted, on this, the 10th day of August, 1894, shall go into effect from and after the date of its adoption, and be published in volume 99 of the Alabama Reports.

ERRATA.

In *Rogers v. Brooks*, p. 34, 13th line from top of page, instead of *surrender* read *severance*.

In *Holcombe v. State*, p. 185, first head-note, for section 4331 read section 4431.

In *Windham v. Nat. Fertilizer Co.*, p. 578, 2d head-note, second line, instead of *entered* read *served*.

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CASES

IN THE

SUPREME COURT OF ALABAMA,

NOVEMBER TERM, 1891,*

—AND—

NOVEMBER TERM, 1892.*

Commercial Fire Insurance Co. v. Board of Revenue of Montgomery County.

Proceeding by Insurance Company to be Relieved from Taxation on so much of its Capital Stock as is Invested in the Capital Stock of a Bank.

99	1
99	75
99	1
103	627
99	1
128	241
128	639

1. *Definition of the capital stock of a corporation.*—The capital stock of a corporation is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and is a trust fund for the benefit and security of the creditors of the corporation.

2. *Capital stock of one corporation can not be invested in the capital stock of another corporation.*—A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for the capital stock of a new corporation; nor can it do this indirectly through persons acting as its agents.

3. *Insurance company not authorized to subscribe to the capital stock of another corporation.*—Section 1535, subdivision 7 of the Code, which provides that insurance companies may “invest their money in real or personal property, stocks or choses in action,” does not authorize insurance companies to subscribe for and invest its capital stock in the capital stock of other corporations.

4. *Taxation; insurance company not relieved as to its capital stock invested in other corporations.*—An insurance company, which has invested a portion of its capital stock in the capital stock of another corporation, can not be relieved from the payment of taxes assessed against such part of its capital stock, on the ground that such portion is “invested in property which is otherwise taxable,” as provided by section 453, subdivision 9, of the Code.

*The first 21 cases of this volume should have been published in earlier volumes, but were omitted through inadvertence or mistake.

[Commercial Fire Ins. Co. v. Board of Revenue Montgomery Co.]

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

The proceeding in this case was commenced by a petition filed by the Commercial Fire Insurance Company, addressed to the Board of Revenue of Montgomery County; and sought to have an assessment made by the tax assessor of Montgomery county against the petitioner reduced, by deducting from said assessment, among other items, \$51,000.00 of the capital stock of the Commercial Fire Insurance Company, which was invested, as alleged in the petition, in the capital stock of the Bank of Montgomery. The petition was denied by the Board of Revenue, and the cause was carried to the Circuit Court by *certiorari*, where it was again denied. From this last judgment the present appeal is prosecuted; and its rendition is here assigned as error.

TOMPKINS & TROY, for appellants.

MOORE & FINLEY, *contra*.

STONE, C. J.—The appellant, the Commercial Fire Insurance Company, and the Bank of Montgomery, each of them, is a private corporation under the laws of this State. The capital stock of each of these corporations is one hundred thousand dollars. The purpose of the present proceeding, instituted by the insurance company, is to obtain relief from State and county taxes assessed against its capital stock, to the extent of fifty-one thousand dollars of such capital stock, on the following ground: "That said capital is invested as follows: \$51,000 thereof in the capital stock of the Bank of Montgomery, a corporation organized under the general incorporation laws of the State of Alabama, authorized to do a banking business." The petition then sets up other exemptions claimed, but no question is raised on this appeal as to those other asserted exemptions. We will confine what we have to say to the one item of fifty-one thousand dollars, invested in the capital stock of the Bank of Montgomery.

The petition further avers "that its said capital stock was not worth on the first day of January, 1890, exceeding the sum of one hundred thousand dollars; that said stock held by it in the Bank of Montgomery was at that time worth par, and has been returned to said tax assessor by said bank for taxation at par. . . . Petitioner claims that it was not bound to return for taxation said capital stock held by it in the Bank of Montgomery, . . . that the same was

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[Commercial Fire Ins. Co. v. Board of Revenue Montgomery Co.]

returned for taxation by the corporation issuing the same, and it was liable to be taxed, and the taxation thereon charged against the said corporation. And petitioner avers the fact to be that said corporation did return for taxation its capital stock as hereinbefore stated." Petition then averred that the tax assessor had refused to allow a credit to it of the \$51,000 of its capital stock so invested in that amount of the capital stock of the Bank of Montgomery.

The petition from which we have copied was filed with the Board of Revenue of Montgomery County, and by that body disallowed. The contention was then carried by *certiorari* to the Circuit Court, and again the claim was disallowed. From that judgment the present appeal is prosecuted.

Under our revenue law—Code of 1886, § 453—it is provided, that "For the use of the State, and to raise revenue therefor, there is levied an annual tax of sixty cents on each hundred dollars in value, upon the following property: . . .

. . . "9. The capital stock of all corporations, companies or associations created or existing under any law in force in this State, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association; but when such corporation, company or association pays the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation, company or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed." The word *only* appears to be redundant and misplaced in this section. The tax rate has been reduced since the adoption of the Code of 1886. See Sess. Acts 1888-9, pp. 42 and 61.

We have a general law in relation to insurance companies, commencing with section 1531 of the Code of 1886. Such companies are clothed with large and liberal powers.—Code, § 1535. Our general banking law is found in the chapter which commences with section 1521 of the Code of 1886. The powers of such banks are enumerated in section 1525. It will be seen that the two classes of corporations have very many powers in common. Each is required to have a capital stock subscribed in good faith of not less than fifty thousand dollars, of which not less than twenty-five thousand dollars must be actually paid in by the subscribers before the filing of the declaration preliminary to incorporation.—Code of 1886, §§ 1522, 1532.

[Commercial Fire Ins. Co. v. Board of Revenue Montgomery Co.]

What is capital stock of corporations, and why are they required to have a capital stock paid in?

"Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation. . . . At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses, or increased by gains."—Cook on Stock & Stockholders, § 3.

"A stockholder has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation."—*Ib.* § 4a.

"A stockholder in an insurance company has the same rights that a stockholder in any other corporation has." *Ib.* § 4a.

"A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation. By the Court of Appeals of New York it is said that 'the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts.'"—*Ib.* § 5.

In *Neiler v. Kelly*, 69 Penn. St. 403, Justice Sharswood said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends."

Questions have arisen on the liability of stockholders to pay for stock subscribed, the objection being urged that irregularity had intervened in the organization, either accidental, intentional, or fraudulent. In 2 Morse on Banks, § 669, replying to this objection, it is said: "This plea can not be sustained to the injury either of corporate creditors or of subsequent *bona fide* purchasers or holders of the stock, who have taken it without participation in, or knowledge of any illegality or fraud. . . . It might avail, if the question lay only between the bank and the subscriber; but the corporation in such cases is not regarded as the real or exclusive party in interest. It is rather a trustee for the

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creditors; and they, who are, therefore, the real parties, are certainly not *in delicto*."

§ 671. "To the doctrine of trust must be referred the further principle that a subscription for bank stock can not be diminished after it is once made. So soon as it is legally complete it is an obligation from which even the directors can not grant the subscriber any absolution, either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. The directors do not represent these persons, and are authorized to discharge an indebtedness of which they are the real beneficiaries."

§ 672. "The doctrine that the stock subscriptions are in the nature of a trust fund for payment of corporate liabilities seems to be well established. From it results the principle that subscribers can not avail themselves of the statute of limitations in bar of the claims of creditors to have payments made. For the subscribers are chargeable with the trust, and though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights."—*Semple v. Glenn*, 91 Ala. 245; 2 Morawetz on Private Corp. §§ 787-8-9; *Wood v. Dummer*, 3 Mass. 308.

The foregoing quotations are made with a view of presenting clearly and fully the nature and object of capital stock in a corporation. As property it has peculiar attributes. Collectively it is the property of the corporation, while the ownership of the shares is in the shareholders. Sale and disposition of the shares by the several owners, is free and untrammelled, save as the law or by-laws of the corporation may have prescribed rules. Not so with the capital stock. That is a security or pledge the law exacts, as a condition on which it grants the corporate franchise—the right to incur liabilities, for the discharge of which no responsibility rests on any natural person. It is the indispensable condition on which the law-making power grants the franchise, because the law and public policy so declare. And the capital stock is a trust fund; a trust for the benefit and security of the corporation's creditors. The directory, or governing body of the corporation are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. The uses are, *first*, to meet and discharge any liabilities and debts of the corporation which disaster may bring upon it; and, *second*, to restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand, after discharging the corporation's liabilities to creditors.

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It is not intended to be affirmed that the governing board of the corporation is required to keep the capital stock unemployed in its locked vaults. It should be utilized with a view of making it productive in some line of investment, or operation, within the scope of its corporate powers. There is this limitation to its authorized use. It must be within the scope of the corporate powers, and must be done with reference to the interest and success of the corporation whose capital stock it is. When this is the case, there is fidelity in the execution of the trust.

If this trust fund be misapplied to objects or uses outside of the scope of the corporate powers, this is a breach of trust, and fastens a personal liability on those who perpetrate the wrong, commensurate with the injury, if any, caused by the misapplication. And persons receiving the trust fund so misapplied, knowing it to be such, make themselves trustees *in invitum*, and render themselves liable to the corporation whose funds are thus misapplied, or to the creditors of the corporation for any diminution the trust fund may suffer in the transaction.

Among the powers conferred on incorporated insurance companies by our statute are the following, embraced in Code of 1886, § 1535, subdiv. 7: "To invest their money in real or personal property, stocks or choses in action, and to sell the same; to lend money, discount bills, and secure the payment thereof; to buy and sell exchange, and receive and pay out deposits." These are comprehensive powers. What is meant by the language, "To invest their money in . . . stocks or choses in action, and to sell the same?" Will it, or can it be contended that the authority to invest in stocks, confers the power to subscribe to the capital stock of another corporation in process of organization? And if it confers the authority to subscribe for and become a stockholder in another corporation, in what description of corporation may the insurance company become a stockholder? The statute employs only the generic word stocks; and that word, if it include bank shares, applies equally to shares in all private corporations. Can the insurance company invest its capital stock, and thus become a stockholder in any and every description of private corporation, at the mere will and pleasure of its governing body? The vast variety of corporations now in use and operation need not be referred to, to show to what extreme results this interpretation would lead. Railroads, telegraph lines, telephones, express companies, mining and manufacturing enterprises—these are only a few of the numerous subjects of incorporation

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under the law. Can an incorporated insurance company under our statute subscribe for stock in the organization of each, all, or any of the numerous corporations now so common in human transactions? The statute has a different meaning.

Stocks—shares in corporations—have come to be, in a large degree, subjects of commercial dealing and speculation. The newspapers contain tables of the ruling prices of stocks, as their market value fluctuates. These notices refer to the shares of stock in organized corporations. Their sale neither increases nor diminishes the capital stock in the corporation; it neither adds to, nor takes from the corporation one dollar of its stock. It simply changes its ownership *pro tanto*. The capital remains in the corporation in tact, and the security it furnishes, and is intended to furnish, the creditors of the corporation remains unimpaired.

When we speak of capital stock of a corporation, we are understood to refer to the sum subscribed in its organization. When we speak of stock, we mean the certificates issued by the corporation to the shareholders, which certificates, like titles to property, furnish the evidence of ownership of the shares of stock. Capital stock is the aggregate of money or other valuable thing contributed, or paid into the common treasury, as a condition of the exercise of corporate functions, and a security for their faithful and prudent exercise. It is the property of the corporation, charged with a trust, it is true; but nevertheless, in its possession, and under its control. The stock, stocks or shares of stock do not belong to the corporation. They belong to the shareholders, and are exclusively under the individual control of the several owners. The stocks, which the statute authorizes insurance companies to invest their money in, can not mean capital stock owned and to be held by the corporation. This, we have seen, is a trust fund. It means the stock owned by stockholders, usually evidenced by stock certificates. Stock, as a subject of commercial dealing, is what the legislature meant in the statute we are interpreting. The very connection in which the word is used in the statute confirms this interpretation. "To invest their money in . . . stocks or choses in action, and to sell the same," is the language employed. There is not even a comma between the words "stocks" and "choses in action," nor a shade of difference in the powers conferred as to each. The power to invest in and to sell is very appropriate language when applied to commercial dealings. It is very inapt, if the intention was to confer authority to subscribe for stock in the formation of another corporation.

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The interpretation we have given to the present record, to the effect that the insurance company invested \$51,000 of its capital stock in subscribing that amount of it to the capital stock of the Bank of Montgomery, when the latter corporation was being formed, is rested on the language of the petition for *certiorari*, which brings this case before us. The correctness of our interpretation is placed beyond controversy by the brief and argument of appellant's counsel. It is there in effect admitted, and attempted to be justified, that when the bank was being organized, the capital stock of the one was invested in the other, to the extent of the credit claimed. This, of course, means that, to that extent, the capital stock of the insurance company became the capital stock of the bank.

Cook on Stock and Stockholders, § 317 and notes, treats of the power of one corporation to subscribe for stock in another. It is there said: "An insurance company has no power or legal right to subscribe for stock in a savings bank and building association, nor to purchase stock in another insurance company." In section 316, the same author said: "A banking corporation has at common law no power to purchase or invest in another corporation, whether that other corporation be itself a bank or of a different business."

In 1 Morawetz on Corporations, §§ 431-2, the right of a private corporation, on common law principles, to deal in the stocks of another corporation is discussed, and the limited extent to which it can so deal is defined. It is not one of the direct grants of power with which it is clothed, but a mere incidental means for conserving some interests which become imperiled. It may accept them as security for the payment of money, and, when necessary, may receive them in payment of a doubtful debt. But this same learned author, in section 433, employs this language: "A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools."

In treating this case, we must bear in mind the precise question we have in hand. The attempt was being made to collect the taxes off the capital stock of the Commercial Fire Insurance Company; the capital of that corporation, and nothing else.—Code, § 453, subdiv. 9. The tax is, by statute, levied on the capital stock of corporations. In the corporation's petition to be relieved of a part of the tax thus levied, it describes it as a tax on the capital stock. It

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avers, "That said capital stock is invested, . . . \$51,000 thereof in the capital stock of the Bank of Montgomery." The corporation owned its capital stock, and, presumptively at least, did not own the shares of its capital stock. Hence the propriety and reasonableness of the averment that it was so invested, and not shares in its capital stock, pretermittng, for the sake of argument, its want of corporate power to invest its capital stock. The exact and specific case made in the petition is, that the capital stock of one corporation—the thing itself—is invested in the *capital stock* of another corporation. And, it may be added, this averment was necessary, to give the petition a semblance of merit. Capital stock—the insurance company's capital stock—was the subject of the tax, and in order to maintain the discount or deduction claimed, it was necessary to aver and show that that specific subject of taxation—the capital stock—or some portion of it, had been "invested in property which is otherwise taxed as property." We are thus confronted with the question, can one and the same sum of money, at one and the same time, serve the purpose of capital stock for two corporations?

We have shown by the highest legal authority that the capital stock of a corporation is a trust fund for the security and benefit of the creditors of the corporation, and that the managing board fills the relation of trustee for its preservation and administration. Corporations, acting within the scope of corporate powers, fix no liability on their officers, or on any one else. They charge only the corporation. Hence the purpose and policy of requiring a capital stock, as security and indemnity of persons who become its creditors. The law-making power confers on them privileges—a franchise, a right to make contracts in its artificial name without fastening a liability on any natural person—and it exacts from them as a condition on which it grants this franchise—this privilege and power—that they place a capital stock in safe pledge for the security of their creditors. And this capital stock is a permanent investment, with no power in the shareholder to withdraw it, until the corporation is wound up and all its debts paid, and no power in the managing board to permit it to be withdrawn, at the expense of creditors. It is a trust fund in the corporation's treasury, to be used only in its interest, and whatever of profit or emolument it may yield belongs of right to the corporation, its creditors and shareholders. It must be kept within the corporation and under its control, to meet the purpose for which it was required to be raised and paid in. It is not

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materially unlike any other pledge that is placed as a guaranty of faithful performance of debt or duty. It is a fixed pledge until the debt is paid, or the duty performed.

Such being the nature, the status of capital stock in a corporation, can one and the same fund supply this want and fill this condition for two corporations? The law required one hundred thousand dollars of capital stock, as a condition on which it granted the corporate franchise for that amount of capital to the Commercial Fire Insurance Company, and the same amount from the Bank of Montgomery as the condition on which it conferred a similar franchise on it. Will a single sum of one hundred thousand dollars meet and satisfy this double demand? The law does not grant acts of incorporation in the undoubting faith and trust that they will be profitably and successfully administered. If there was neither distrust nor doubt, no guaranty, no pledge, no capital stock paid in should be required. The law, basing its action on experience, requires this guaranty, this security, because human enterprises often miscarry. Let us suppose, that in the case before us disaster should overtake both corporations, and it should become necessary to exhaust the capital stock of each in the payment of its liabilities. Is it not manifest that the one hundred thousand dollars the law required as a pledge and guaranty from each company would not be forthcoming? Fifty-one thousand dollars of the sum could not meet the double demand of that sum from the respective creditors of the two companies. One dollar can not pay two.

Let us take a further step. If corporation No. 1 can, of its one hundred thousand dollars of capital stock, supply fifty-one of the hundred thousand dollars the law requires of corporation No. 2, and yet retain its one hundred thousand dollars of stock, no sound argument can be formulated why it could not furnish the bank with the whole hundred thousand dollars of capital with the same result. And if corporation No. 1 can, from its own capital, furnish the capital stock of corporation No. 2, why can not corporation No. 2 render the same service to corporation No. 3? And why can not this process be carried on indefinitely? Would not such proceedings be an utter subversion of the purpose and policy which require that corporations, as a condition of the franchise they ask to be clothed with, shall furnish this security for those with whom they propose to have dealings? These questions can receive but one answer, and that answer is, that corporations have no authority to subscribe their

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own capital stock in the capital stock of another corporation in process of organization.

The claim set up by appellant in this case, as we have shown, is rested on the statutory authority given to insurance companies "to invest their money in real and personal property, stocks or choses in action, and to sell the same." This is the entire authority conferred; and, as we have shown, the power to subscribe for shares, and thus aid in the formation of another corporation, is not among the general, incidental or implied powers a corporation is clothed with. Unless such power is expressly granted, it does not exist. The governing body of a corporation does not act for itself, but for another—the corporation. The corporation is the principal, the governing board the agent. In the matter we have in hand, the power of such governing board is not distinguishable, on any sound legal principle, from that of an agent, or attorney in fact, constituted by private appointment. Neither can do acts binding on the principal beyond the scope of the power conferred; and the rule and principle for admeasuring the power of each must of necessity be the same. Now, let us suppose that A, a private person, by power of attorney, constitutes B his agent and attorney in fact, with power "to invest his (the principal's) money in real and personal property, stocks and choses in action, and to sell the same." Let us suppose further that under this power B should attempt to invest A's money in subscribing for shares in a projected, unorganized corporation. Would any one contend that the power of attorney had given him authority to do so? Most assuredly not.

When the attempt was made to invest the insurance company's capital stock in the bank's capital stock, the governing board did an act which was *ultra vires*. Failing to bind the corporation, did not the act, like all such attempts by trustees, simply bind the members of the board personally? They could not thereby invest the capital stock of the insurance company, for that was a trust fund. They were without power or authority to so invest it. And if, in the fluctuations of trade, it shall become necessary to resort to the capital stock of that company to meet its liabilities, could the plea that it had been invested in the capital stock of another corporation avail anything? To render such defense available, should not the attempted investment be such as the corporate authorities were authorized to make? "Capital stock does not vary, but remains fixed. . . . The directors do not represent these persons, [the creditors

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of the corporation], and are not authorized to discharge an indebtedness of which they [the creditors] are the real beneficiaries." Each corporation being organized on the basis of one hundred thousand dollars of capital stock, should a crisis arise which calls for that stock, would not the governing board be required to account for it and produce it, unless they can show it has been invested in something else, in which their corporate powers authorized them to invest it?

Not having invested the money in any thing they were authorized to invest it in, is it not the sentence of the law that they made no investment whatever? And if the money is not found in the vault of the corporation, are not the directors personally liable for it? The law and public policy estop each corporation from denying it has a separate capital stock of one hundred thousand dollars, unless it is shown that all, or some portion of it has been "invested in property which is otherwise taxed as property," and that such investment was within the scope of its corporate power.

It follows that the insurance company is not entitled to the credit claimed.

Affirmed.

McCLELLAN, J., and WALKER, J., dissenting.

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Bill in Equity to Enforce Vendor's Lien.

1. *Notice of vendor's lien to sub-purchaser.*—A sub-purchaser of land, knowing that a part of the purchase-money is unpaid, is put on inquiry as to the existence of the vendor's lien, and is chargeable with notice of it, if still outstanding.

2. *Notice of vendor's lien to mortgagee; when superior to mortgage.* Where a mortgage is executed to a firm, knowledge by one of them that the mortgagor had failed to pay at least part of the purchase price is sufficient to put the mortgagees on inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase-money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage.

3. *Same; when mortgagee's duty to inquire of vendor.*—An inquiry by the mortgagees from the mortgagor and a denial by him of the existence of any lien on the land is not sufficient to entitle the mortgagees to protection as *bona fide* purchasers, since it was their duty to

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inquire directly from the vendor ; the mortgagor being interested adversely to the vendor's lien.

4. *Purchaser at execution sale subsequent to execution of mortgage acquires only an equity, which is subordinate to vendor's lien.*—A purchaser at an execution sale, made subsequent to execution of a mortgage by the judgment debtor, acquires only the equity of redemption left in the mortgagor, and, having no legal title, and his equity being subsequent in point of time to that of the mortgagor's vendor, he is not entitled to protection against the vendor's lien as a *bona fide* purchaser, though he had no knowledge or notice whatever of its existence.

5. *Equitable estate purchased by mortgagee with notice does not give priority over vendor's lien.*—The fact that the mortgagees, whose title was itself subordinate to the vendor's lien, because of their knowledge of its existence, acquired the equitable estate of the purchasers at the execution sale, cannot give them priority over the vendor's lien.

6. *Notice to one partner of non-payment of purchase-money is notice to each member of the firm.*—Where land is purchased by a partner, having notice of the non-payment of the purchase-money, for the benefit of the firm, each member is chargeable with such notice of the non-payment of the purchase-money and the retention of a vendor's lien ; and one of them who subsequently acquires the land as his individual property, can not claim protection against the vendor's lien as a *bona fide* purchaser.

APPEAL from Chancery Court of Mobile.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed by the appellee, Elijah S. Taylor, on August 13, 1888, against Thomas P. Miller & Co. and the individual members of said firm, and Samuel Timney, Mary L. Timney, R. D. Byrne, and Frank E. Overall, as assignee of Thos. P. Miller & Co.

The purpose of the bill was to enforce a vendor's lien on certain property, which was specifically described therein. It was averred in the bill that on August 1, 1883, the complainant sold and conveyed by deed to R. D. Byrne, the lands upon which the vendor's lien was sought to be fastened for the recited consideration of \$1,250.00. None of the purchase-money was paid, but Byrne executed to Taylor his two promissory notes for \$625.00 each, dated August 1, 1883, and payable, respectively, one and two years after date. On December 22, 1883, the said R. D. Byrne, individually, and certain firms, of which he was a member, executed a mortgage to Thos. P. Miller & Co., to secure the payment of advances made to said Byrne and the said firms, and in this mortgage conveyed to said Miller & Co. the lands purchased by Byrne from Taylor, with other lands.

On December 17, 1884, Thos. P. Miller & Co., as mortgagees, claiming that the mortgage was in default, took possession of the property conveyed therein, and on the same day, entered into a contract of sale for said lands with the

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firm of Worthington & Timney, a co-partnership composed of Chas. M. Worthington and Samuel Timney, the said Timney being a member of the firm of Timney, Riley & Co., one of the firms who executed the above mentioned mortgage to Thos. P. Miller & Co., and of which firm the said Byrne was also a member. In furtherance of this agreement Thos. P. Miller & Co. executed a deed to said Worthington & Timney, on January 19, 1885, conveying the property included in the mortgage; and took a mortgage back from said Worthington & Timney upon the same lands, to secure the payment of the purchase-money.

On January 5, 1885, the said Worthington & Timney having made default in the payment of said purchase-money for the lands, Thos. P. Miller & Co. sold said property at public outcry, and Charles B. Miller, one of the members of the firm of Thos. P. Miller & Co., became the purchaser thereof. A deed to said lands was duly executed by Miller & Co. to Charles B. Miller, and on January 13, 1886, the said Charles B. Miller conveyed the same property by quit-claim deed back to Thos. P. Miller & Co. After the purchase of said lands from Charles B. Miller, as aforesaid, the said Thos. P. Miller & Co., on October 20, 1887, sold and conveyed the same property to said Samuel Timney, a part of the purchase-money being paid in cash, and notes given for the balance. On the same day, October 20, 1887, the said Samuel Timney executed a mortgage on said lands to his wife, Mary Timney, to secure the payment of an indebtedness of said Samuel Timney to his said wife, he claiming that the money paid in cash to Miller & Co. was borrowed from his wife, who expected to make the deferred payments.

On March 27, 1888, Thos. P. Miller & Co. made a general assignment for the benefit of creditors to Frank E. Overall, of all the property owned by them, including the notes for the unpaid purchase-money, due by the said Timney to the said Thos. P. Miller & Co., for the lands which had been sold by them to said Timney.

It was further averred in the bill that at the time of giving the mortgage to Thos. P. Miller & Co., by R. D. Byrne, Timney, Riley & Co. and others, on December 22, 1883, the said Miller & Co. had due notice that the purchase money had not been paid to the complainant, E. S. Taylor, by R. D. Byrne, and that, therefore, the complainant had a lien upon a portion of the land, which was included in the mortgage; and this averment was made repeatedly, and in different ways, throughout the bill.

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In their answer to the bill by Samuel and Mary Timney, and Frank E. Overall as assignee, notice of the non-payment of the purchase-money by Byrne to Taylor was denied, and it was alleged in said answers that Thos. P. Miller & Co. and their sub-vendees were *bona fide* purchasers without notice. It was also averred in said answers, and shown by the evidence, that on June 10, 1884, Camors & Co., a mercantile firm, recovered a judgment in the United States Circuit Court at Mobile, against R. D. Byrne; that execution was issued on this judgment, and was levied by the United States marshal on the land involved in this controversy; that the said lands were sold under said execution, at which sale Camors & Co. became the purchasers, and that a deed was executed by the United States marshal to said Camors & Co. dated December 4, 1884; that in January, 1885, the said Camors & Co. sold the title to the land acquired by them at said sale, to said Thos. P. Miller & Co., and that at the time of the marshal's sale and purchase by them, and their sale to Thos. P. Miller & Co., Camors & Co. had no notice whatever of the claim of said Taylor against the said lands.

The testimony of the complainant, E. S. Taylor, and the said R. D. Byrne, tended to show that at the time of the execution of the mortgage to Thos. P. Miller & Co. on December 22, 1884, Miller & Co. were notified that Taylor had never been paid for his lands. The said Byrne testified that at the time of giving said mortgage he said to Charles B. Miller, one of the firm of Thos. P. Miller & Co., when asked about the Taylor land, that he, Byrne, had never paid any of the purchase-money for said land, but that it was worth four times as much as he agreed to give for it, and that if Miller & Co. would pay the purchase-money notes, he would be willing to include the said land in the mortgage; and that upon this representation, Miller said that they would arrange the matter satisfactorily, and included the land in the mortgage.

These facts were denied by the respondents, and in the deposition of Charles B. Miller, he testified that said Byrne had made no such statement to him, but that he knew that a part of the purchase-money, which Byrne had agreed to pay to Taylor for the land in question, had not been paid.

Upon the final submission of the cause, on the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief paid for. This decree is now appealed from, and the same is here assigned as error.

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OVERALL & BESTOR for appellants.—If Camors & Co. were *bona fide* purchasers without notice, Miller & Co., who bought their title, hold under them as *bona fide* purchasers without notice.—*Cahalan v. Monroe*, 56 Ala. 303; *Bartlett v. Varner*, 56 Ala. 580. The conveyance from Taylor to Byrne being absolute, and reciting therein the payment of the purchase-money, the *onus* of proof of notice is on Taylor.—*Hightower v. Rigsby*, 56 Ala. 126; *Wynn v. Rosette*, 66 Ala. 517. A *bona fide* purchase for a valuable consideration without notice will defeat the vendor's lien.—*Turner v. Wilkinson*, 72 Ala. 361; *Bankhead v. Owen*, 60 Ala. 457. A purchaser at a sale under a mortgage, although having actual notice of an outstanding equity, may nevertheless take advantage of the want of notice on the part of the mortgagee, since otherwise the mortgage would be a worthless security. *Cahalan v. Monroe*, 56 Ala. 303; *Bartlett v. Varner*, 56 Ala. 580. An innocent mortgagee, who parts with value *in presenti*, or incurs an obligation to do so *in futuro*, stands, in the eyes of the law, as if he were a vendee of the absolute title, and is entitled to equal protection.—*Rogers v. Adams*, 66 Ala. 600; *Wheelan v. McCreary*, 64 Ala. 319; *Coleman v. Smith*, 55 Ala. 368.

CLARK & CLARK, *contra*, cited *Webb v. Robbins*, 77 Ala. 183; *Hodges v. Coleman*, 76 Ala. 103.

MCCLELLAN, J.—It is not necessary to a decision of this case that we should undertake to arrive at the truth between the witnesses Byrne and Charles B. Miller, as to whether the former informed the latter before the execution of the mortgage, under which Thomas P. Miller & Co. claim to be *bona fide* purchasers without notice of the land involved here, that no part of the purchase-money therefor had been paid and that Taylor, Byrne's vendor, had a lien on the land for its payment. That inquiry aside, it is most clear from the testimony of Charles B. Miller himself that he, and of consequence the firm of Thomas P. Miller & Co., for which he was acting and of which he was a member, had notice, at and before the execution of the mortgage, that a part, at least, of the purchase-money which Byrne had agreed to pay Taylor for the land in question had not been paid. Knowledge on the part of Miller & Co. of this fact put upon them the duty of inquiry which, if diligently prosecuted, we can not doubt would have led to the discovery, first, that no part of the purchase-money had been paid, and, second, that Taylor retained a vendor's lien on the land

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for the full amount of the agreed price; and it follows that Miller & Co. must be held to notice of Taylor's lien at the time they claim to have purchased without said notice. *Lomax v. LeGrand*, 60 Ala. 537; *Feaster, Neville & Co. v. Stallworth et al.*, 62 Ala. 547; *Taylor v. A. & M. Ass'n.*, 68 Ala. 229; *Rosette v. Wynn*, 73 Ala. 146; *Webb v. Robbins*, 77 Ala. 176; *Woodall v. Kelly*, 85 Ala. 368; *Thompson v. Shepard*, 85 Ala. 611.

The fact, if it be one, that Byrne assured Miller & Co. that his vendor had no mortgage or lien on the land to secure the payment of the purchase-money did not relieve them from this duty of further inquiry, nor change in any degree the legal results flowing from its omission. Byrne's deed was notice to them of the identity of his vendor, and the inquiry should have been made of him. No inquiry from Byrne alone nor information given by him in denial of the existence of a lien would meet the requirements of the rule, he being interested adversely to the lien.—2 Pom. Eq. Jur. § 601; *Simpson & Hall v. Hinson*, 88 Ala. 527; *Manasses v. Dent*, 89 Ala. 565; *Weil v. McWhorter*, 94 Ala. 540; 10 So. Rep. 131.

The judgment recovered by Camors & Co. against Byrne and another, the issuance of execution thereon, the levy thereunder on the land in controversy, the sale of the same, and its purchase by the plaintiffs in that action all occurred after the execution of the mortgage by Byrne and others to Miller & Co. This mortgage carried the legal title into Miller & Co., and left in Byrne only the right to reinvest himself with the title by meeting the conditions of the mortgage—the equity of redemption and nothing more. This equitable estate alone could have been and was levied upon and sold under the judgment of Camors & Co., and they acquired only this equity in the land. To this equity, the claim of Taylor for unpaid purchase-money was prior in point of time. On this state of the case Camors & Co. were not entitled to protection against Taylor's lien as *bona fide* purchasers without notice, and this, wholly regardless of the fact that they had no knowledge or notice whatever of the existence of such lien. One essential factor in their right to protection against the latent equity of Taylor is lacking, in that they did not acquire the *legal title* by their purchase at the marshal's sale. Without this they had a mere equity which, being subsequent in point of time to Taylor's, is subordinate to the lien for purchase-money. "The whole principle on which protection is afforded a *bona fide* purchaser," said Brickell, C. J., "proceeds on the sub-

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stantial reason, that by parting with a valuable consideration he has acquired an equity equal in dignity to the outstanding equity of which he has no notice. As a mere equity, that he acquires must be subordinate to older equities, but annexed to it is the legal estate, and it is the legal estate which gives him precedence. In *Hinds v. Vattier*, 7 Pet. 271, C. J. Marshall said: 'The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate, and pays the purchase-money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of of any prior equity.' "—*Shorter v. Frazer*, 64 Ala. 74. And the same doctrine is declared in the following cases: *Craft v. Russell*, 67 Ala. 9; *Hooper v. Strahan*, 71 Ala. 75; *May v. Wilkinson*, 76 Ala. 543; *State v. Connor*, 69 Ala. 212.

Our conclusion that Camors & Co. were not entitled to protection as *bona fide* purchasers without notice might probably be rested on other grounds as well as that stated, but that one will suffice for a decision of the case. Camors & Co., therefore, held this equity of redemption precisely as Byrne had held it—subordinate to Taylor's vendor's lien; and it was this inferior equity alone which Miller acquired from them; and, in their hands, it can no more aid their defense of *bona fide* purchase without notice than had they taken an absolute deed from Byrne in the first instance with notice of the lien, or had cut off, and thus acquired, by foreclosure Byrne's equity of redemption having had notice of the lien when the mortgage was taken. Indeed, it is not conceivable how the position of Miller & Co. could in anywise be helped by drawing to their legal title, which was itself subordinate to Taylor's lien, because of their knowledge of the lien, an equity which was secondary to the complainant's, regardless of notice *vel non*. They, in other words, had no rights against the complainant by reason of their legal title, and that title may, therefore, be left out of view; and they had no rights against him on their purchase from Camors & Co., because they acquired a mere inferior equity thereby, and because also they took that with notice of complainant's dominant equity.

The claim of Timney to protection as a *bona fide* purchaser without notice is equally without merit. The evidence shows that the land was purchased by Byrne from Taylor as a member of and for the firm of Timney, Riley & Co., of which both Byrne and respondent Timney were mem-

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bers, and that it became the assets of that firm. Each member of that partnership is, therefore, chargeable with notice of the non-payment of the purchase-money, and the retention of a lien therefor by Taylor.—17 Am. & Eng. Encyc. of Law, pp. 1080–1083.

The claim of Mrs. Timney is not insisted on in argument. As was said by the chancellor, nothing material is offered in support of her alleged interest; and there was no error in disallowing her claim to protection.

The decree of the Chancery Court is affirmed.

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Action on a Garnishment Bond.

1. *Action on garnishment bond; limitation of admitted evidence.*—In a suit on a garnishment bond which had been executed for the issuance of a writ of garnishment in an action to recover the statutory penalty for willfully and knowingly cutting down trees on the lands of another (Code, § 3298), it furnishes no ground of complaint to defendant, after allowing defendant's agent, who sued out the garnishment in the former suit, to testify that he found a person cutting trees on defendant's land, who told witness that he was cutting for plaintiff, that the court should limit this evidence to the question of the vexatious or malicious suing out of the writ of garnishment, when there is no offer to connect plaintiff with such act of cutting further than by the declaration itself.

2. *Same; burden of proof to sustain plea of set-off.*—In order to sustain a plea claiming as a set-off to a recovery on a garnishment bond the statutory penalty originally sued for by defendant, the burden is on the defendant to reasonably satisfy the jury that plaintiff willfully and knowingly cut the trees, or had them cut.

3. *Same; injury to credit by issuance of garnishment not recoverable.* While the refusal of the court to instruct the jury that "Damages for injury to credit, resulting solely from the failure of plaintiff to get the amount suspended by the garnishment, are not recoverable in this suit" on the garnishment bond, may be error, it is not available to defendant when the complaint counts on injury done to plaintiff's credit by tying up in the hands of the garnishee the money due him, and issue is joined on such a count, and the plaintiff, without objection, introduces evidence to support it.

4. *Same; misleading charge.*—The taking of a non-suit is not conclusive of the fact of indebtedness *vel non*; and a charge which asserts "that the non-suit taken in the garnishment suit was not a breach of the [garnishment] bond," if not positively erroneous, is misleading and should be refused.

5. *Same; right to consider what was done in the garnishment trial.* An instruction that "The jury can not consider for any purpose, what

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happened on the trial of the garnishment suit;" or that "The jury can not consider, for any purpose, the fact that the plaintiff in the garnishment suit took a non-suit," does not assert a correct proposition of law.

6. *Same; responsibility of principal for acts of agent.*—A principal is not responsible for the malice, vexation or wantonness of an agent in suing out a writ of garnishment, unless the principal authorized, participated in or ratified such act; and such authority, participation or ratification can not be inferred from the mere relation of principal and agent, but must be proved.

7. *Same; defense as to vexatious suing out of a writ.*—An honest belief, founded upon reasonable grounds, that a writ of garnishment was necessary, may furnish a defense against a recovery for vexatious suing out of the writ; but is no answer to the claim for actual damages sustained by the wrongful suing out of the writ.

8. *Liability under section 3296 of Code, 1886.*—The purchase of trees with the knowledge that they had been cut down and taken away from the lands of another, in violation of the statute (Code, § 3296), does not subject the purchaser to the statutory penalty, unless he participated, aided or abetted in the cutting or taking away.

APPEAL from Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the appellee, C. M. Reed, against the appellant corporation; and sought to recover damages for the breach of a bond given by defendant as principal, to secure the issuance of a writ of garnishment. It was alleged in the complaint that suit was brought by the defendant in this action against C. M. Reed, the present plaintiff, to recover the statutory penalty for willfully and knowingly cutting down 176 trees, which were upon the land of the Alabama State Land Company, without the consent of said company; and that the bond now sued on was made, and writs of garnishment were issued to debtors of said C. M. Reed, for the purpose of collecting the said claim; but that before the termination of said suit against Reed, the plaintiffs therein took a non-suit.

The defendant pleaded the general issue, and interposed several special pleas, offering to set-off its claim against the plaintiff for willfully and knowingly cutting down trees upon its land without its consent. There was a demurrer to the amended complaint, but the record does not show that the court ruled on the demurrer.

In the present action the plaintiff introduced evidence tending to show that he was not, at the time of the execution of the bond sued on, indebted in any amount to the Alabama State Land Company; that the writ of garnishment sued out by the defendant caused the garnishee to withhold from the plaintiff several thousand dollars for several months after the same became due and payable to

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him; and that, as the result of the issuance of such writ of garnishment, his credit was greatly impaired, and he was put to serious inconvenience. The testimony for the defendant tended to show that, at the time of the execution of the bond and the issuance of the writ of garnishment in the suit against said Reed, he was indebted to the defendant in this action. The tendency of all the evidence for the defendant was to controvert the testimony introduced by the plaintiff. An exception was reserved to the ruling of the court in sustaining the plaintiff's objection to the testimony of the witness Howard, which ruling is sufficiently shown in the opinion.

At the request of the plaintiff in writing, the court instructed the jury as follows: "In the set-off claimed by defendant for the penalty of \$10.00 per tree, the burden of proof is on defendant to satisfy you reasonably that Reed willfully and knowingly cut the trees, or had them cut; and if after considering all the evidence, you are not reasonably satisfied that Reed willfully and knowingly cut the trees, or had them cut, then you will not allow said set-off." The defendant duly excepted to the giving of this charge, and also separately and severally excepted to the court's refusal to give to the jury each of the following written charges asked by it: (1.) "Damages for injury to credit resulting solely from the failure of Reed to get the amount suspended by the garnishment are not recoverable in this suit." (2.) "The defendant asks the court to charge the jury, that the non-suit taken in the garnishment suit was not a breach of the bond." (3.) "The jury can not consider, for any purpose, what happened on the trial of the garnishment suit." (4.) "The jury can not consider, for any purpose, the fact that the plaintiff in the garnishment suit took a non-suit." (5.) "The affidavit for the garnishment having been made by Howard, the agent of the Alabama State Land Co., the said company would not be responsible for malice on the part of Howard." (6.) "If the jury believe from the evidence that, at the time of the suing out of the garnishment, and during the year 1888, prior thereto, any persons had cut down upon the lands of the Alabama State Land Company any trees, and such persons had removed the timbers so cut from said lands, and had sold the same to the plaintiff, Reed, that the plaintiff, Reed, became liable for such purchase to the Alabama State Land Company, for the value of such trees, although the persons who did such cutting and said Reed were ignorant of the fact that the lands upon which such cutting was done

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belonged to the Alabama State Land Company ; and if such liability existed, and Howard, the agent of said company, who made the affidavit for the garnishment, believed that garnishment was necessary to obtain satisfaction of such claim, then the plaintiff in this action can not recover." (7.) "If the jury believe from the evidence that, at the time of the suing out of the garnishment, any oak or pine trees had been cut down upon the lands of The Alabama State Land Company, willfully and knowingly, and without the consent of said company, and that the plaintiff Reed assented to such cutting at the time thereof or afterwards, then said Reed, by such assent, would make himself a party to such trespass, and liable for the penalty imposed for such cutting." (8.) "If the jury believe from the evidence that, at the time of suing out the garnishment, and during the year 1888, previous thereto, any trees upon the lands of the Alabama State Land Company, had been cut down by any person or persons, knowingly and willfully, and without the consent of said company, and that the plaintiff Reed purchased such trees with knowledge that they had been so cut down, he thereby assented to such trespass, and became liable for the penalties for such cutting."

There was judgment for the plaintiff in the sum of \$500. The defendant brings this appeal, and assigns as error the rulings of the court upon the evidence and charges.

SMITH & LOWE, for appellant.

CHISHOLM & WHALEY, *contra*.

COLEMAN, J.—The Alabama State Land Company sued C. M. Reed to recover from him the statutory penalty, provided in section 3296 of the Code, for having willfully and knowingly cut down one hundred and seventy-six trees, which were on the lands of the plaintiff. The plaintiff in that suit, by its agent Howard, made affidavit, and executed bond for the issuance of garnishment process. That trial resulted in plaintiff taking a non-suit.

The present suit was brought by Reed upon the garnishment bond, to recover damages for the wrongful or vexatious suing out of the garnishment process.

The first assignment of error is, that the court refused to permit the witness Howard to testify that he found a person cutting the trees, who told him that he was cutting for Reed. The record shows that this evidence was admitted after the objection ; but limited by the court to the

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question of the vexatious or malicious suing out of the garnishment. There was no offer to connect Reed with the act of this person engaged in the cutting of the trees, further than by the declaration itself. The admission of this evidence, limited as it was to the question of vexatiously or maliciously suing out the garnishment, furnishes no ground of complaint to appellant.

In the charge given at the request of the plaintiff, the court properly placed the burden of proof on the defendant to reasonably satisfy the jury that Reed had willfully and knowingly cut the trees, or had them cut, in order to sustain defendant's plea of set-off.

Credit is a conclusion of fact, partly based on opinion, founded more or less on reputation.—*Pollock v. Gantt*, 69 Ala. 373. An injury to credit is a legitimate ground for the recovery of actual damage.—*Durr v. Jackson*, 59 Ala. 203; *Flournoy v. Lyon*, 70 Ala. 308.

The only damages recoverable in this State for failing to meet a purely moneyed obligation at maturity, is the interest which subsequently accrues. Damages resulting from the mere delay to collect the money when due gives no cause of action. Such damages are too remote, and are purely speculative.

The record fails to show that the court ruled on the demurrers to the amended complaint. In such case, we must presume that the defendant waived his right to have judgment pronounced upon them.

Whatever error, as a legal proposition, may have existed in the refusal of the court to give charge No. 1 requested by the defendant, it is not available to it, under our system of pleading. The plaintiff in his complaint counted as a cause of damage on the injury done to his credit by tying up the money due him in the hands of the garnishee. Issue was joined upon the count, and the plaintiff without objection introduced evidence in support of it. Referring the charge to the pleading and proof, there was no error in its refusal.

The taking of a non-suit in an attachment suit is not conclusive of the fact of indebtedness *vel non*; and in a suit upon the attachment bond, the record of the attachment suit is always admissible.—*Dothard v. Sheid*, 69 Ala. 135; *Pounds v. Hamner*, 57 Ala. 346.

Charge No. 2, requested by defendant, was calculated to mislead, if not positively erroneous; and charges numbered 3 and 4 assert incorrect propositions of law.

The principal is not responsible for the malice, vexation or

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wantonness of the agent, unless the principal authorized or participated in it, or subsequently ratified it; and such authority or participation can not be inferred from the mere relation of principal and agent.—*Jackson v. Smith*, 75 Ala. 97; *Burns v. Campbell*, 71 Ala. 271; *Pollock v. Gantt*, 69 Ala. 373; 73 Ala. 186-96; 7 Ala. 629. Charge No. 5 is faulty in that it ignores all consideration of the question of participation in, or ratification of, the intent of the agent by the principal. Charge 6 is argumentative; and is defective in that it precludes any recovery for the mere wrongful suing out of the garnishment. An honest belief, founded upon reasonable grounds, that the writ was necessary, may furnish a defense against a recovery for a vexatious suing out of the writ, but is no answer to the claim for actual damages sustained by reason of a wrongful suing out of the writ of garnishment. The case of *Pounds v. Hamner*, 57 Ala. 342, was not intended to assert a contrary rule.

Charges 7 and 8 assert incorrect propositions of law. Although Reed may have purchased the trees with the knowledge that they had been cut and taken away from the lands of another in violation of the statute (Code, § 3296), the simple fact that he purchased the trees with such knowledge, not having participated or aided or abetted in the cutting or taking away, does not subject him to the statutory penalty.

We find no error in the record included in the assignments of error.

Affirmed.

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Action for Damages Caused by Construction of Railroad Embankment.

1. *Injuries to abutting property by building railroad in street; when action lies.*—When a corporation, authorized by its charter to build a railroad along certain streets, has, in the construction of its railroad, injured property abutting on such streets, without first paying compensation for such injury, an action at law will lie for the redress of such wrong.

2. *Same; measure of damages.*—The measure of damages for such an injury caused to abutting property is the difference in the market value of the property before and after the act complained of;

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and the amount of the damage, so ascertained, can not be diminished by the fact that property along the line of the railroad appreciated in value, or was generally benefitted by its construction.

3. *Same; demurrer to complaint.*—In an action to recover such damages, a demurrer to a complaint, which states a good cause of action, is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damage for the injury alleged.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This was an action brought by the appellees against the appellant, and sought to recover damages for injuries caused to plaintiffs' lot, by the construction by defendant of an embankment, for the track of a railroad, along the avenue on which the lot in question abutted. To the complaint as amended the defendant demurred upon the ground, among others, that the plaintiffs can not recover damages for permanent injury to the land, in this form of action. This demurrer was overruled. The tendency of the evidence is sufficiently shown in the opinion.

The court, at the request of the plaintiffs, gave the following written charges: (1.) "The rule by which the damages are to be estimated in this case is the difference between the market value of the property, immediately before the taking or injury, and such value, immediately after the taking or injury, caused by the construction of the railroad—in other words, the diminution in value at the time produced thereby." (2.) "Market value is the price which the property will bring when offered for sale in the market, not at a forced sale on short notice, but after such reasonable time as would be ordinarily taken to make a sale of like property. It is the highest price which at such sale those having the ability and the occasion to buy are willing to pay." (3.) "If the jury are reasonably satisfied that the overflow of water on plaintiffs' property is increased by the embankment erected by the defendant for its railroad, then this is a circumstance to be considered by you in estimating any damage to the market value of the plaintiffs' property." (4.) "Plaintiffs are entitled to just compensation for all injury done to plaintiffs' property by the construction of defendant's railroad on the embankment in front of the property, and the fact that property along the line of defendant's railroad appreciated in value generally, or was generally benefitted by the construction of the railroad, can not be considered by you to diminish, or as a set-off to any special damage that you may find to have been done to plaintiffs' property, resulting in a reduction of its market value by the construction of defend-

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ant's railroad." The defendant separately excepted to the giving of each of these charges; and also separately excepted to the court's refusal to give to the jury each of the following written charges: (1.) "That the plaintiffs are not entitled to recover as damages the difference between the value of the property before the construction of the railroad, and the value thereof after such construction." (2.) "That the cost of filling the lot up to the level of the railroad is not the measure of damages in this case, and the jury can not consider such cost in estimating damages." (3.) "That in estimating damages, the jury can not consider the permanent injuries, if any, which the plaintiffs have sustained by reason of the construction of the railroad in Avenue E, in front of the plaintiffs' lot."

There was, on the first trial, judgment for the plaintiff in the sum of \$750.00. Upon the court's granting a new trial, from the rulings in which the present appeal is prosecuted, there was judgment for \$1,000.00. The defendant prosecutes this appeal, and assigns as error the rulings of the court upon the pleadings and charges.

ALEX. T. LONDON, for appellant.

CHISHOLM & WHALEY, *contra*.

WALKER, J.—This was an action to recover damages caused to the plaintiffs' lot near the city of Birmingham by the construction of an embankment for the track of the defendant's railroad in the street or highway upon which the lot abutted. It was alleged in the complaint, and there was evidence tending to show, that the defendant is a corporation clothed with the right to call into exercise the power of eminent domain, and authorized by its charter to build its railroad along the street or highway in question, and that, without the consent of the plaintiffs, and without making them compensation, it built its railroad upon a fill or embankment made in front of the plaintiffs' lot, and thereby obstructed the ingress and egress to and from such lot, and otherwise injured it. The averments and proof show that a corporation invested with the privilege of taking private property for public use has, in the construction of its works, injured such property, without first paying compensation for such injury. This constitutes a violation of the rights secured by Section 7 of Article XIV of the Constitution of Alabama. For the redress of such a wrong an action at law lies. The jurisdiction of a court of equity to prevent the

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commission of such a wrong is not based upon the absence or inadequacy of legal remedies for the recovery of damages for the wrong when it has been consummated. The recognized equitable remedies may find support upon either of two grounds: 1st. Upon the special jurisdiction of courts of equity to confine corporations to the exercise of the powers conferred upon them by law; and 2d, upon the inadequacy of legal remedies to protect the constitutional right in its entirety, courts of law being unable to compel the payment of compensation to the property owner *before* his property is taken, injured or destroyed.—*Columbus & Western Rwy. Co. v. Witherow*, 82 Ala. 190; *East & West R. R. Co. v. E. T. V. & G. R. R. Co.*, 75 Ala. 275. The property owner, however, may fail to avail himself of the preventive equitable remedies, and rely upon his action at law, for the redress of the wrong after it has been committed. If his land has been taken without his consent, and without having been duly acquired by condemnation proceedings, he can maintain ejectment for its recovery,—*Hooper v. Columbus & Western Rwy. Co.*, 78 Ala. 213; *New Orleans & S. R. R. Co. v. Jones*, 68 Ala. 48. If his property has not been so taken, but has been injured by the construction of the defendant's works, he may sue at law to recover damages for such injury.—*Jones v. N. O. & S. R. R. Co.*, 70 Ala. 227. Such actions have been maintained in this court without question, and we are unable to discover any reasonable ground upon which the right to maintain them can be controverted. *Ala. Mid. Rwy. Co. v. Coskry*, 92 Ala. 255; 9 So. Rep. 202; *Ala. Mid. Rwy. Co. v. Williams*, 92 Ala. 277; 9 So. Rep. 203; *Evans v. Savannah & Western Rwy. Co.*, 90 Ala. 54; *City Council of Montgomery v. Townsend*, 80 Ala. 489; *City Council of Montgomery v. Maddox*, 89 Ala. 181. The property owner may waive former condemnation proceedings, and yet recover such damages as he may suffer in his property by reason of the building of the railroad upon or near it.—*Little Rock & F. S. R. R. Co. v. McGehee*, 41 Ark. 202; 20 Am. & Eng. R. R. Cas. 82; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *Cohen v. St. Louis & C. R. R. Co.*, 22 Am. & Eng. R. R. Cas. 116. A claim in the complaint of damages which the plaintiffs are not entitled to recover in this action does not impair the right to maintain the suit. A demurrer to a complaint, which states a good cause of action, is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damages for the injury alleged.—*Kennon v. Western Union Tel. Co.*, 92 Ala. 399; 9 So. Rep. 20; *Carl v. Sheboygan & C. R. R.*

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Co., 46 Wis. 625. There was no error in overruling the demurrers to the complaint.

The principal contention in the case is upon the rulings of the trial court on the question of the measure of damages. The appellant insists, that the plaintiffs could not be entitled to recover prospective damages, that they were treating the obstruction complained of as a nuisance, and that in an action for the injury caused thereby their recovery could not go beyond the damages sustained prior to the commencement of the suit. In the Alabama cases against municipal corporations, the measure of damages for injury caused to abutting property, by changes in the grades of streets or sidewalks, has been stated to be the difference in the market value of the property before and after the act complained of.—*City Council of Montgomery v. Maddox*, 89 Ala. 181; *City Council of Montgomery v. Townsend*, 80 Ala. 489. The appellant contends that those authorities are not applicable here. It is true, that the rule contended for by the appellant is supported by the decisions in several states. In *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; 53 Am. Rep. 123, the suit was by an abutting owner to recover damages sustained from the construction of a railway in the street fronting his premises; and after a full consideration of the question of the measure of damages, it was held that the plaintiff could recover only temporary damages, that is, such damages as had been sustained up to the commencement of the action. This ruling has been adhered to in later cases arising in that court, and some other courts have reached similar conclusions.—*Carl v. Sheboygan &c. R. R. Co.*, 46 Wis. 625; 6 Am. & Eng. Encyc. of Law, 595, note 4. There are evidences in the later New York cases that that court has not remained satisfied with the decision in the *Uline Case*. The inconveniences which have been developed in the attempts to adhere to that ruling have, however, been obviated, in a great measure, by encouraging such shifts as permitting damages for permanent injury to property to be assessed in such cases, if the defendant failed to invoke the benefit of the decision against the propriety of this course, thus allowing the rule as to the measure of damages to be determined by the acquiescence of the parties, rather than by the law; or, by allowing a judgment for past loss of rentals, and, in the same case, granting an injunction restraining the further operation and maintenance of the road, unless the defendant paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation.—*Pond v. Metropolitan Elevated Rwy.*
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Co., 112 N. Y. 186; 8 Am. St. Rep. 734; 3 Sedgwick on Damages, (8th Ed.), 465-476, where there is a review and criticism of the New York cases. The principal reasons suggested for limiting the recovery in a case like this one to the damages sustained up to the commencement of the suit are: 1st. That when the defendant has paid the permanent damages it should have a clear title to the property taken, and such title can not be acquired as a result of a judgment against it in an action for trespass or for a nuisance; and 2d, that the person injured by a nuisance may have it abated, and it would be unjust to allow the plaintiff to recover damages for the permanent injury caused to his property by the nuisance, and still retain the right to bring subsequent actions for damages caused by a continuance of the nuisance, and also the right to have the nuisance itself abated at any time. The first of these reasons can have no weight on this case. The counsel for the plaintiffs expressly waived the right to recover compensation for the property which was taken by the defendant. The claim was for damages for the injury to the lot abutting on the street where the obstruction was made. The plaintiffs' entire claim would be satisfied by the payment of damages. If the defendant had had those damages assessed in condemnation proceedings, it would have acquired no title to the injured property. It is no objection to a judgment for the whole damages in this case that the defendant does not thereby get title to property which it has not taken and which it does not seek to acquire. When compensation has been made to the plaintiffs for the injury to their property, they can no longer disturb the defendant on that account. The other reason suggested implies that the obstruction complained of must be treated as an abatable nuisance. It was not so treated in this case. There is nothing in the complaint or in the evidence to indicate that the embankment or fill was constructed otherwise than as the defendant would have been authorized to construct it, if the damages occasioned thereby to the plaintiffs' property had been first assessed and paid. If the injury was such that final compensation therefor could have been made in condemnation proceedings, its character was not changed by the fact that such proceedings were not resorted to. There is no magic in such proceedings to compel a resort thereto in order to obtain an assessment of damages for an injury, the full damages for which, in any other proceeding, would be regarded as legally unascertainable, or as incapable of recovery. Damages which can be assessed in condemnation proceedings can be assessed just

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as well in an ordinary action at law. It is not perceived why the payment of the damages, awarded on a formal condemnation, could be any more effectual to prevent the maintenance of subsequent suits by the property owner, than would the payment of a judgment of a court of law for damages for exactly the same injury. The grievance of the plaintiffs is that they have not been paid for the injury caused to their lot. That claim can be fully satisfied by payment of a judgment for damages. There is nothing to indicate that the maintenance in its present condition of the structure erected by the defendant in front of the plaintiffs' lot will furnish them with any legal cause of complaint after they shall have been paid for the injury to their property. The plaintiffs' entire cause of action can be disposed of just as effectually in this suit as in any other form of proceeding. If the structure in question is of a permanent character, its existence and continuance in its present condition constitute but one wrong. Future and past damages on account of it are attributable to but one cause. To allow successive suits for the recovery of such damages in parts would amount to giving several causes of action for a single tort. This would be in violation of the principle that fresh damage, without fresh injury, does not authorize a second or subsequent action. That cases like the present one come within this principle is the generally accepted view. The New York rule of damages recoverable at law has not prevailed in analogous cases decided in other jurisdictions. *New York Elevated R. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432. In *O'Brien v. Penn. S. V. R. R. Co.*, 119 Pa. St. 184, the action was for damages to property caused by excavations made along the street upon which the property abutted. It was held that the injury was single and indivisible, and that the damages could not be severed. In *Fowle v. New Haven & N. Co.*, 112 Mass., 334, it was held that the plaintiff could recover for prospective, as well as past, injury caused by the construction of a road-bed in such a manner as unnecessarily to turn the current of a stream against his land and wash away his soil. In *Chicago & E. I. R. R. Co. v. Loeb*, 118 Ill., 203, it was decided that, for taking or injuring land by the permanent structures of a railroad, there should be but one response in damages.

The reasonable rule on the subject, and the one which is maintained by the preponderance of the authorities, is, that, where permanent structures are erected so as to cause a depreciation in value of adjacent or contiguous reality, the injured party may, and therefore must, recover compensa-

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tion in one action for the entire loss ; 1 Sedgwick on Damages, (8th Ed.), § 95 ; 5 Am. & Eng. Encyc. of Law, 20 ; *Indianapolis B. & W. Rwy. Co. v. Eberle*, 110 Ind. 542 ; *City of North Vernon v. Voegler*, 103 Ind. 314 ; s. c. 53 Am. Rep. 134 ; *Troy v. Cheshire R. R. Co.*, 23 N. H. 83 ; and that the damages in such a case are to be measured by the depreciation in the market value of the property caused by the structure in question.—3 Sedgwick on Damages, 414. The result is that the rule as to the measure of damages which has been stated in Alabama cases against municipal corporations for similar injuries to property is equally applicable here. The charges given by the trial court on the question of the measure of damages are in harmony with the rule above announced. The charges upon that subject which were requested by the defendant, and refused by the court, were to the effect that prospective damages were to be excluded. As the evidence tended to show that the obstruction complained of is of a permanent character, causing permanent injury to plaintiffs' lot, those charges were properly refused.

The rulings of the court involving other questions, though assigned as errors, were not insisted upon in the argument for the appellant, and, for that reason, will not be considered.

Affirmed.

Rogers v. Brooks.

Action for Statutory Penalty for Cutting Trees.

1. *Action of trespass ; what necessary to maintain it.*—The gist of an action of trespass is the injury done to the possession ; and to support it, the plaintiff must show that, as to the defendant, he had, at the time of the injury, the rightful possession, actual or constructive. If the owner has parted with possession, conferring on another the exclusive right of present enjoyment, retaining in himself only a right to enter into possession at some future time, he can not maintain trespass for an injury to property while the particular right of possession is continuing.

2. *Landlord can not maintain trespass against his tenant.*—A landlord, who is not in possession of leased premises, and who is not entitled to the present enjoyment thereof, can not maintain trespass against his tenant to recover the penalty imposed by statute (Code, § 3296), for willfully and knowingly cutting trees without the consent of the owner of the land.

3. *Debt proper form of action to recover penalty imposed by section*

99	31
101	124
101	294
101	537

99	31
106	550

99	31
108	584

99	31
123	608
124	467

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3296.—Since the statute, (Code, § 3296), creates a new right in the owner of land, but fails to prescribe any remedy for its enforcement, an action of debt is the proper remedy for a recovery of the penalty imposed, on the ground of an implied promise, which the law annexes for its payment.

4. *Necessary averment by complaint to recover penalty.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint which avers that plaintiff is the owner of the land from which the trees were cut, the number and description of the trees, and that they were knowingly and willfully cut by defendant, without plaintiff's consent, contains all the facts required to be alleged by the statute; and will be treated as an action in debt, and not in trespass.

APPEAL from Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This was an action brought by the appellant, C. T. Rogers, against the appellee, J. D. Brooks; and sought to recover the statutory penalty for willfully and knowingly cutting trees upon the land of the plaintiff, without her consent. The amended complaint was in the following language: "The plaintiff claims of the defendant the sum of twenty thousand dollars (\$20,000.00) damages for that the defendant on the 23d day of April, 1890, and on divers other days and times between that day and the commencement of this suit, willfully and knowingly without consent of plaintiff, and plaintiff was then the owner of the land, cut down and destroyed the following number of trees and saplings belonging to the plaintiff, to-wit: one thousand (1000) oak trees and one thousand (1000) saplings of that kind; one hundred (100) Elm trees and fifty (50) saplings of that kind; five hundred (500) hickory trees and one hundred (100) saplings of that kind; fifty (50) wild cherry trees and fifty saplings of that kind; one thousand (1000) pine trees and five hundred saplings of that kind, then growing and being in and upon the plantation of plaintiff, situate in Montgomery county in the State of Alabama, and known as the Charlotte Thompson Place, which plantation was occupied by the defendant as the tenant of plaintiff, and the plaintiff was during said time the owner of said plantation during all of said times, and therefore plaintiff brings this suit."

The defendant demurred to this complaint, on the ground that it did not show that plaintiff was in possession of the lands, or had the right to the immediate possession thereof, at the time of the alleged cutting of said trees. This demurrer was sustained, and plaintiff failing to plead further, judgment was rendered for the defendant. Hence this appeal.

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ARRINGTON & GRAHAM, for appellant.

RICHARDSON & REESE, *contra*. Trespass can not be prosecuted against a tenant of the landlord for damages.—*Beatty v. Brown*, 76 Ala. 269; *Cooper v. Watson*, 73 Ala. 254; 1 Smith's Leading Cases, 7th Ed., 660; *Brothers v. Hurdle*, 10 Ired. (Law), 490; *Powell v. Smith*, 2 Watts (Pa.) 126; 1 Chitty's Pleadings, Star Page 63; 2 Hilliard on Torts, 589, note b; 9 Bacon Abridgment, 498; *Reynolds v. Williams*, 1 Tex. 311.

THORINGTON, J.—This action is based on the provisions of section 3296 of the Code, and was brought by appellant against appellee to recover the statutory penalty for willfully and knowingly cutting trees without consent of the owner of the land.

The complaint alleges appellant's ownership of the land, specifies the kind of trees willfully and knowingly cut by defendant from the lands without plaintiff's consent, and also avers that defendant was, at the time of the cutting, in possession of the land as appellant's tenant.

There was a demurrer to the complaint on the ground that it did not show plaintiff's possession of the land, or right of immediate possession, at the time the trees were cut, or at the commencement of the action; the demurrer being predicated on the theory that the complaint is in trespass. The Circuit Court sustained the demurrer, plaintiff declined to amend, and, on judgment being rendered against her, prosecuted this appeal.

"The gist of an action of trespass is the injury done to the possession; to support it the plaintiff must show that, as to the defendant, he had, at the time of the injury, rightful possession, actual or constructive. The general property draws to it the possession if there be no intervening, adverse right of enjoyment. . . . But if the general owner has parted with the possession, conferring on another the exclusive right of present enjoyment, retaining in himself only the right to take or reserve possession at some future time, or on the happening of some contingency, or event in the future, his right of possession is in reversion, and he can not maintain trespass for an injury to the property while the particular right of possession is continuing."—*Boswell & Woolley v. Carlisle, Jones & Co.*, 70 Ala. 244; 2 Greenl. on Ev., (14 Ed.), § 616.

The substance of the complaint or declaration in trespass is, that the defendant has forcibly and wrongfully injured

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the property in the possession of the plaintiff, and, under the general issue, the plaintiff must prove that the property was in his possession at the time of the injury, and this rightfully, as against the defendant; and that the injury was committed by the defendant with force.—2 Greenl. on Ev., § 613.

In the case of *Cooper v. Watson, Adm'r.*, 73 Ala. 252, this court said: "The doctrine seems well settled, upon principle and authority, that if the owner of the land be not in the actual possession, if he can show title to the things severed from it, only by showing title to the land, a personal action for the taking, conversion or detention of such things will not lie. If he have the possession at the time of the surrender, the rule is different. But if his possession is divested—if his right lie in entry—and the adverse possessor . . . severs a tree, or other thing from the land, the things severed are converted into chattels. But they do not become the property of the owner of the land; he is out of possession, and has no right to the immediate possession of such things, nor can he bring any action to recover them, until he acquires possession."

The doctrine laid down in this case was re-affirmed in *Beatty v. Brown*, 76 Ala. 267, which was an action of trespass based on the same statute under which the plaintiff in this action is proceeding, viz., Code, § 3296, and is also supported by the following authorities: *Brothers v. Hurdle*, 10 Ired. (N. C.) 490; *Powell v. Smith*, 2 Watts (Pa.) 126; 1 Smith's Leading Cases, (H. & W. notes, 7 Amer. Ed.), 660.

According to the foregoing principles and authorities, possession by plaintiff of the land at the time of the trespass and of instituting the action is necessary in order to support it, and furthermore, if trees or other things are severed from the land by an adverse holder, and thus converted into chattels, they are not the property of the owner of the land, he being out of possession, and not having the immediate right of possession. But the statute, in a sense, changes the common-law rule by creating a new right in the owner of the land. It prescribes a fixed penalty for cutting trees of specified classes, and a smaller penalty for all other trees, and requires the same to be paid to the owner of the land; and this without reference to whether he was in possession of the land at the time of the cutting or not, or whether the cutting is done by a person in adverse possession of the property or not.—*Allison v. Little*, 93 Ala. 150.

While, however, the statute creates a new right in the owner of the land, it does not prescribe any remedy for its
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enforcement, consequently remitting the owner for its enforcement to the appropriate remedies furnished according to the course of the common law, or by the terms of other statutes of the State. In other words, the change wrought in the common law by this statute affects the right and not the remedy.

Applying these principles to the case under consideration, it is apparent from the allegations of the complaint, construing it most strongly against the pleader, as we must do, that the plaintiff was not in possession of the land, either at the time of the alleged trespass or at the commencement of the action, and that the tenancy averred in the complaint was not simply at will, but under a lease for a term of years, that being the most unfavorable to the plaintiff.—*Winter v. Quarles*, 43 Ala. 69.

Treating it as a tenancy for years, and not at will, the property, at the time of the alleged trespass, was not in the actual possession of the plaintiff, nor was it in her constructive possession, in such sense as to support an action of trespass, as would have been the case had the land been held by a servant or agent of the plaintiff for her, but it was in the rightful possession of the defendant.

The complaint avers no exception of the trees from the lease in favor of the landlord, and in the absence of such an exception, although the landlord, if she should invade the tenant's possession and cut down trees, she would be liable to the tenant in trespass for the damages resulting therefrom to his particular interest; such as the mast and fruit of such trees, and shade for his cattle; and although if the trees should be cut by a stranger, both the landlord and tenant would have an action for their respective losses, yet, it is well established, that trespass will not lie against the tenant in favor of the landlord for a similar act of cutting; the landlord must redress his injury as against the tenant in a different form of action.—*Pomfret v. Ricraft*, 1 Saund., top page, 486, and note 5; *Brothers v. Hurdle*, 10 Ired. (N. C.) 490; *Taylor's Land. & Ten.*, § 771.

At common law the action of debt is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise which the law annexes. The rule of decision in this State is in harmony with the common law, and has been stated thus: "When a statute creates a liability to pay money, but does not prescribe any remedy by which a recovery shall be had, debt is the proper remedy." *Strange v. Powell*, 15 Ala. 452; *Blackburn v. Baker*, 7 Port. 284.

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Although the complaint in this record was demurred to as being in trespass, and has been so argued and treated by both parties here, we can not accept that view. The character of a complaint or plea is not determined by what the parties designate it, but by the facts averred in it, and when it is uncertain what form of action was intended, if the facts as averred indicate that the plaintiff is proceeding for a measure of recovery adapted to the one form of action, it must be held that the complaint belongs to that form of action, whether it be *ex delicto* or *ex contractu*.—*Whilden v. M. & P. Nat. Bank*, 64 Ala. 1.

The complaint in this case follows neither the common-law form for an action of trespass *quare clausum fregit*, nor the corresponding statutory action for which a form is prescribed in the Code; but it does aver every fact necessary to bring it within the act, by setting forth every circumstance necessary to a proper description of the offense. It avers that the plaintiff was the owner of the land from which the trees were cut, the number and description of the trees cut, of the different kinds specified in the statute, and that they were knowingly and willfully cut by defendant without plaintiff's consent; and from these facts, so averred, the law implies the promise of defendant to pay the penalty prescribed by the statute. We think it sufficiently clear, from the facts stated in the complaint, that the proceeding is directly within the terms of the statute for the recovery of the penalty therein prescribed.

The ruling of the Circuit Court on the demurrer to the complaint is not in harmony with the conclusion we have reached; and its judgment is accordingly reversed, and the cause remanded.

Reversed and remanded.

Oden et al. v. Dupuy, et al.

Bill in Equity to remove Cloud from Title, and to quiet Title to Land.

1. *Sale under decree of Probate Court; estoppel.*—When lands are sold under a decree of the Probate Court, and the purchase-money is received by the administrator, and accounted for in his administration, the sale, in a court of equity, will be treated as valid, and the parties estopped from impeaching it.

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[Oden et al. v. Dupuy et al.]

2. *Same*.—One who has received and retains the proceeds of property sold, even though sold without authority, is estopped from claiming the property itself. To receive and retain the proceeds is a ratification of the unauthorized sale.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in the present case was filed May 29, 1889, by the brothers and sisters, heirs-at-law, of James M. Ware, deceased, and it makes defendants the descendants of Mrs. Dupuy and of William S. Mudd, the remaining heirs at law of James A. Mudd, deceased. The avowed purpose of the bill is to remove a cloud from James M. Mudd's title to certain land, described in the bill of complaint, as the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 27, Township 17, Range 3 West.

The facts of the case are sufficiently stated in the opinion. Upon the final submission of the cause, on the pleadings and proof, the chancellor decreed that the complainants were not entitled to the relief prayed for, and ordered that their bill be dismissed. The present appeal is prosecuted by the complainants, and the chancellor's final decree is assigned as error.

HEWITT, WALKER & PORTER, for appellants.—(1.) In construing the petition for sale to the Probate Court, the same rules of construction apply as in construing deeds and wills. Under the facts of the case, the effect of describing the lands as the "Anderson Place," was to include the 40 acre tract involved in this controversy.—*Kimbrell v. Rogers*, 90 Ala. 333; *Liles v. Ratchford*, 88 Ala. 397; *O'Neal v. Seixas*, 85 Ala. 80; *Wright v. Wright*, 34 Ala. 194; 2 Dev. on Deeds, §§ 1013-1017, 1038-1040. (2.) The complainants were entitled to the relief prayed for.—*Bell v. Craig*, 52 Ala. 215; *Robertson v. Bradford*, 73 Ala. 116. (3.) Parties can not act upon and adopt such parts of a transaction as may be favorable and beneficial to themselves, and, at the same time, repudiate it so far as it may involve them in corresponding duties to others. (4.) The complainants had acquired title by right of adverse possession.—*Duncan v. Williams*, 89 Ala. 341; *L. & N. R. R. Co. v. Philyaw*, 88 Ala. 267; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436; *Bozeman v. Bozeman*, 83 Ala. 416; *Burks v. Mitchell*, 78 Ala. 61.

GARRETT & UNDERWOOD, *contra*.—(1.) A court of equity in this State has no jurisdiction to review or correct the proceedings of the Probate Courts of this State, for the sale of lands of estates of decedents, for division, except such as is conferred expressly by statute.—*Ganey v. Sikes*, 76 Ala. 421; *Lowe v. Guice*, 69 Ala. 80. (2.) The com-

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plainants in this cause have no right to claim the interference of a court of equity to remove a cloud on the title, or to quiet the title.—*Orton v. Smith*, 18 How. 263; *Ward v. Chamberlain*, 2 Black. 430, 444; *West v. Schnellley*, 54 Ill. 523; *Huntington v. Allen*, 44 Miss. 654; *Stark v. Starrs*, 6 Wall. 402; *Meloy v. Dougherty*, 16 Wis. 269; *Phelps v. Harris*, 101 U. S. 374-5; *Phelps v. Harris*, 51 Miss. 789; *Banks v. Evans*, 10 Sm. and Marsh. 35; *Fontaine v. Hudson*, 93 Mo. 62; 3 Am. St. Rep. 520. (3.) The Probate Court could not make a valid order for the sale of the 40 acre tract of land in controversy. The power to decree a sale by said court is limited to the lands accurately described in the petition.—*Fielder v. Childs*, 73 Ala. 567; *Gilchrist v. Shackelford*, 72 Ala. 7; *Cruikshank v. Luttrell*, 67 Ala. 318; *Tyson v. Brown*, 64 Ala. 244; *Bland v. Bowie*, 53 Ala. 152. (4.) The sale of the said 40 acre tract can not be proved by parol. It being a judicial sale, it can be proven only by the record of the court.—*Deslonde & James v. Darrington's Heirs*, 29 Ala. 92; *Dugger v. Tayloe*, 46 Ala. 320; *Lanford v. Dunklin, et al.*, 71 Ala. 605 and 606; *Comer v. Hart*, 79 Ala. 394. (5.) The complainants did not show title by possession adverse to the defendants, under the statute of limitations.—*Jones v. Pelham*, 84 Ala. 209; *Bishop v. Truett*, 85 Ala. 376; *Dothard v. Denson*, 72 Ala. 545; *Casey v. Morgan*, 67 Ala. 445; *Boykin v. Smith*, 65 Ala. 300; *Tayloe v. Dugger*, 66 Ala. 447; *Collins v. Johnson*, 67 Ala. 304; *Doe v. Hardy*, 52 Ala. 297; 3 Brick. Dig., 17, § 23.

STONE, C. J.—James A. Mudd, died intestate prior to 1868—probably about 1863. He had never been married, and left no lineal descendants. His next of kin, heirs at law, were his brother, William S. Mudd, his sister, Susan S. Dupuy, and James M. Ware and his brothers and sisters, children of Mary J. Ware, a sister of James A. Mudd—she having died before the proceedings after noticed were instituted. William S. Mudd, became the duly appointed administrator of James A. Mudd deceased.

When James A. Mudd, died he owned and resided on a farm, or plantation near the site on which the city of Birmingham was afterwards founded and built up. It consisted of seven hundred or more acres, and was made up of several smaller holdings. He also owned lands, or an interest in them, which lie in the coal or mineral regions, some miles away. The farm or home place was in sections 25, 26 and 35, township 17 and range 3 west, and was made up of what were in part known as the "Anderson

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Place" and the "Lacey Place," so called from former proprietorship, and each of these places contained about 240 acres; 200 acres of the "Anderson Place" lying in section 35, and the remaining 40 lying in section 26, but adjoining that in section 35. The residence of James A. Mudd, at the time of his death, was in section 35, but near to the line which separates it from section 26, which lies immediately north of it; said adjoining part of 26 being the subject of contention in this suit. The fruit orchard, used in connection with the residence, extended into and included a part of the contested forty acre block in 26. James M. Ware resided with his uncle James A. Mudd, at the latter's death, and continued to occupy the premises until the sale after noticed.

In 1868, William S. Mudd, as the administrator of James A. Mudd, deceased, filed a petition in the Probate Court praying an order of sale of the lands of intestate, "for the purpose of distribution and division among the heirs." The order was obtained, and on January 4, 1869, the lands of the home place were sold, the sale reported and confirmed, purchase-money reported paid, and title to purchasers ordered to be made. No imperfection or irregularity is complained of, or perceived in any of these proceedings, except as to the forty acres to be considered further on. About 1873, Wm. S. Mudd, Admr., made a title to Ware, the purchaser; but for some unexplained reason it was never put on record until some fifteen years afterwards. There is complaint that this deed was tampered with.

In the petition for the order of sale is this language: "Lands lying, being and situate in Jefferson county, viz: the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$; E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 35, township 17, range 3 west, known as the 'Anderson place.'" This is an accurate and full description of the sub-tract known as the "Anderson Place," except that it omits one 40 acre subdivision—the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 26. The same omission is found in the report of sale, and in the order to make title. The other sub-tracts which go to make up the James A. Mudd home place, viz, the "Lacey Place" and the "Wilcox Place," are accurately and fully described in all the proceedings, and no dispute or contention is raised about any of the lands, except the said S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 26. One copy of the deed from William S. Mudd to James M. Ware does contain the said disputed 40; but the proof of its accuracy is not very satisfactory. The forty acre tract, which is in controversy in this suit, is not mentioned in any of the pro-

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ceedings anterior to the making of title by the administrator to James M. Ware, and much doubt is left whether it was originally embraced in that instrument.

William S. Mudd died about 1884, Susan S. Dupuy, about 1887, and James M. Ware, in 1888; the latter intestate. The present bill was filed May 29, 1889, by the brothers and sisters, heirs at law, of James M. Ware, deceased; and it makes defendants the descendants of Mrs. Dupuy and William S. Mudd, the remaining heirs at law of James A. Mudd, deceased. The avowed purpose of the bill is to remove a cloud from James M. Ware's title to the south-west quarter of the south-east quarter of section 26, township 17, range 3 west. The bill and pleadings are so framed, however, that if complainants are equitably entitled to the land, they can obtain the proper relief.

A great deal of testimony has been taken in this cause, and much the larger part of it by the complainants. The transcript furnishes evidence that the witnesses are above the average of intelligence, and we discover very little evidence of bias. Some testimony was objected to, and is illegal. We will disregard all illegal testimony, but will not point it out. Nor will we attempt to collate the testimony, but will content ourselves with stating the facts we think it establishes.

James M. Ware was living with his uncle James A. Mudd at the time of the latter's death, and continued to reside there until his own death in 1888. William S. Mudd resided in less than two miles of the premises, and Mrs. Dupuy also resided in the neighborhood. These two next of kin of James A. Mudd were near to and familiar with what was done by Ware, (the latter visited him), and were of necessity acquainted with his occupation of the "Anderson Place," and the nature of his possession and occupation. Ware's possession, control and dominion over the forty acres in dispute were substantially the same as the authority he exercised over that part of the "Anderson Place" which is in section 35; and this continued from the time of the sale, January 4, 1869, until his death in 1888, only a little less than twenty years. His possession and acts were not of such character as those ordinarily exercised by a mere tenant in common. They spoke the language of asserted ownership. While in possession he claimed to own the entire place.

Another view, which is established with equal clearness by the testimony. When the land was offered for sale it was not by government numbers, nor by the acre. It was

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offered by the sub-tracts, as known and classified by James A. Mudd in his life-time; the "Anderson Place," the "Lacey Place," the "Wilcox Place." These several bodies were bid for and purchased, not at so much per acre, but at a gross sum for the sub-tract. And the administrator's report of sale was made in the same way; in each case, a gross sum for the sub-tract.

The testimony tends very strongly to show that the forty acres in dispute were of small value for agricultural uses, and there is no proof that it was mineral or coal land. The forty acres in dispute is touched on two sides by other parts of the Mudd tract, and there is no attempt to explain, or to show any reason for withholding the said 40 acres from sale when the balance of the farm or plantation was sold. And the proof is irresistible that Judge Mudd, the administrator, never set up claim to that forty, or to any other part of the home farm, after the sale in January, 1869. On the contrary, it is fully proved that he frequently said the estate of James A. Mudd owned no lands except the mineral, or coal lands (several miles away), and a lot in Elyton.

A still more emphatic act. William S. Mudd was a stockholder and director in the Elyton Land Company. After that company had laid off and established the city of Birmingham, it purchased back from James M. Ware a part of the said disputed forty acres, and made it a part of that company's city property.

There is proof that William S. Mudd, as administrator, received the entire amount of the purchase-money bid by James M. Ware. This is proved by his report. There is also proof that he distributed it among the next of kin of intestate, and there is no attempt to prove the contrary. We feel we are on safe ground when we announce our conviction, that every dollar bid by James M. Ware was collected by the administrator, and accounted for and distributed among the proper heirs of James A. Mudd.

We summarize our conclusions of fact as follows: The "Anderson Place," at the death of James A. Mudd, comprised 240 acres—200 being in section 35, and the remaining 40 being the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 26. In the petition for an order to sell the lands for distribution, all the subdivisions which go to make up the "Anderson Place" are given and described, except said forty acre block in section 26. This is entirely omitted. And the same omission occurs in the report of sale. When the sale came off the "Anderson Place" was offered, not by numbers, nor by the acre, but as a sub-tract, the "Anderson Place." And it was bid for and

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purchased in the same way—as the “Anderson Place”—for the gross sum of three thousand dollars. So far as the acts of offering, bidding and knocking down were concerned, the sale was of the entire “Anderson Place,” including the disputed 40 acres in section 26. William S. Mudd, the administrator, intended to sell, and thought he was selling the entire tract—the “Anderson Place”—and James M. Ware intended to purchase, and thought he was purchasing the entire “Anderson Place.” And both seller and buyer had the same impression and belief when the purchase-money was paid, received and distributed. The entire testimony forces the conviction upon us that each of them remained of this mind so long as they severally lived. We can not be more specific in the matter of their several intentions and beliefs, for death had sealed their lips before the imperfection in the proceedings became a subject of inquiry, so far as the record informs us. After the purchase, James M. Ware exercised the same control, the same acts of ownership over the disputed forty acres as he did over the rest of the tract. During all the time he paid the taxes on the entire tract.

The present litigation does not appear to be prosecuted between the Wares, next of kin of James M. Ware on the one side, and all the other next of kin of James A. Mudd on the other. The descendants of William S. Mudd, the administrator who made the sale, do not appear to take part in the defense of this suit. Only the descendants of Mrs. Dupuy are active defendants in the present case.

We feel justified in referring to another fact as shedding light on the probabilities which present themselves, in considering the disputed question of fact now before us. If there be merit in the contention that James M. Ware did not purchase and become the owner of the forty acre tract in dispute, then his asserted entire ownership of it, his exclusive use of it, were wrongful from the beginning. Why did William S. Mudd and Mrs. Dupuy permit him to remain in the exclusive possession and enjoyment of it during all the years, if each of them was the owner of an undivided third of it? Why, when the magic growth of Birmingham was increasing by an hundred fold the value of lands that lay near, did they not assert their rights in this property, if they felt they owned such interest?

In *Bell v. Craig*, 52 Ala. 215—opinion by Brickell, C. J.—the question was whether title to the lands had passed by an administrator's sale and conveyance. There had been a final settlement of the administration, and the report of the case recites “that said administrator in chief was paid for

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said lands in full, and the purchase-money was applied by him to payment of the debts due by the estate." The administrator *de bonis non* contended that the sale was void and did not divest the title; and he was attempting to make a second sale under an order obtained by him. The second sale was enjoined by an appellate order of this court. We copy from the opinion of this court as follows: "It appears that the administrator in chief made a final settlement of his administration, to which the appellee, as administrator *de bonis non*, was a party. On this settlement, the purchase-money received by the administrator in chief for the lots in controversy was charged against him, and accounted for fully. . . . It would be unjust to permit him [the administrator *de bonis non*] now, after having treated the purchase-money as assets, suffered them charged against the administrator in chief, and after all who have interests in the estate have received all the benefit which could accrue from a regular and valid sale, to treat the sale as void. It would operate a fraud on the purchaser which can not be tolerated. Those who have interests in the estate would receive compensation for the lands a second time, at the expense of a purchaser whose good faith is not impugned. Whenever lands are sold under a decree of the court of probate, and the purchase-money is received by the administrator, and accounted for in the settlement of his administration, the sale, in a court of equity, will be treated as valid, and the parties estopped from impeaching it."

In *Pickens v. Yarbrough*, 30 Ala. 408-10, the court employed this language: "Upon the case as presented, the complainant has, by his proceedings in the Orphan's Court, obtained a decree for his *pro rata* share of the assets, part of which arose from the sale of the lands. He must be presumed to have done this knowingly, for he does not aver or pretend that he did it ignorantly. He has collected part of his decree; and yet, thus retaining the benefit of that decree, and of the money collected on it, he seeks also to subject the lands to the payment of his demand. In other words, he has knowingly taken his share of the benefit of the proceeds of the sale of the lands, and, retaining that benefit, he wishes to set aside that sale for fraud, and get another benefit from having the lands sold again. He can not do this. He can not assail the sale for fraud, after having knowingly obtained a decree which treated the proceeds of that sale as assets of the estate."

In *Bland v. Bowie*, 53 Ala. 152, 161-2, it was said: "If the proceedings are void, they may elect to confirm them, and

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by conveyance vest in the purchaser all the interest he could have acquired by proceedings strictly conforming to the law. . . . If the purchase-money has been paid and distributed to the heirs, or applied by the personal representative to the payment of debts, a court of equity would compel a conveyance of title from the heirs, if they could not successfully impeach the fairness of the sale."

In *Goodman v. Winter*, 64 Ala. 410, 434, this court said: "It is a plain principle of justice, of right and of law, that a man can not accept the benefits and reject the burdens of a transaction." In *Robertson v. Bradford*, 73 Ala. 116, is this language: "There is no principle of law better settled, or resting on wiser considerations of public policy, and higher considerations of justice, than that no person, whether *sui juris* or under disability, and the character of the disability is not important, who has received and retains the fruits of a judicial proceeding, can be heard to assail it, either for irregularity or illegality, to the prejudice of others who have in good faith relied on it and acted on it as valid." See also, *Butler v. O'Brien*, 5 Ala. 316; *Firemen's Ins. Co. v. Cockran*, 27 Ala. 228; *Williamson v. Ross*, 33 Ala. 509; *Nabring v. Bank of Mobile*, 58 Ala. 204.

It may be objected, that in the cases from which we have quoted there were judicial proceedings, in which the lands in controversy were described, or so referred to as to be susceptible of identification, while in the case we have in hand, the forty acre block in controversy is nowhere described, either in the petition, the order of sale, or the report of sale. We answer, first, that in all the proceedings—the petition, the order of sale and in the report of sale—the "Anderson Place" is distinctly mentioned; and the proof is overwhelming that the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 26, township 17, range 3 west, was and is a part of the "Anderson Place;" and that in the offer of sale, the bidding and the knocking down, the land was announced and described as the "Anderson Place."

A further answer. While it is true, that in the cases reported some form of judicial proceedings had been had, and the lands in controversy were therein described or referred to, yet those proceedings were so imperfect as not to give the court jurisdiction. They were not simply erroneous and reversible, or voidable, but they were void. No significance can attach to a void judicial proceeding, for it is only the equivalent of no proceeding whatever. And the judgments pronounced were in no sense rested on the fact that there had been judicial proceedings. It was raised to the

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higher equitable plane, that having partaken of the fruits of the unauthorized sale, the claimants would not be permitted to retain those fruits, and, at the same time, assert title to the land itself. The claims are incompatible.—*Buller v. O'Brien*, 5 Ala. 316.

Why should the fact that some form of proceedings had been had in the cases we have cited exert any influence in the decision of this case? It was only because those former proceedings were void that the several rulings upon their effect were, or could have been invoked or made. Their nullity furnished the opportunity as well as the necessity of the rulings; for if they possessed any judicial force, the later judgments would not have been needed, nor could they have been rendered. To hold otherwise would be to declare that said former judicial proceedings must have been had, in order to constitute the subsequent payment and receipt of the money an estoppel, while at the same time they were necessarily so imperfect, so absolutely void, as to exert no influence whatever in changing the title and right to the property. Such is not the reason on which the principle rests. The true principle is that one who has received and retains the proceeds of property sold, even though sold without authority, is estopped from claiming the property itself. To receive and retain the proceeds is a ratification of the sale.

We think the testimony leaves no ground for doubt that the forty acre tract in dispute was embraced alike in the offer of sale by the administrator, and in the bid and purchase of James M. Ware; and that he paid the agreed purchase price for the whole tract. Ware, the purchaser, remained in possession and control of the property ever afterwards, until his death; near twenty years after the sale. During all this time he exercised such acts of ownership over the entire "Anderson Place" as only one who asserted ownership would exercise, while William S. Mudd and Mrs. Dupuy, the other tenants in common, though living near by, are not heard to complain of his said possession and use of the land. Conceding that there was neither petition nor order for the sale of the land, these facts take the transaction without the influence of the Alabama statute of frauds, and constitute it a valid sale.—Code of 1886, § 1732, subdiv. 5; *Shakespeare v. Alba*, 76 Ala. 351; *Martin v. Blanchett*, 77 Ala. 288.

In what we have said [we must not be understood as announcing] that the generic description, "Anderson Place," dominates the specific description by government numbers,

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as found in the petition and other documents. The opposite is the rule. We do not affirm that the petition, the order of sale, or the report of sale, either with or without the accompanying proof, authorized or legalized the sale of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 26. We hold the contrary. What we do decide, and all we decide in this connection is, that the great weight of testimony, and the conduct of the parties under and after the sale, demonstrate as facts that in the offer to sell and actual sale by the administrator, the disputed forty acre tract was intentionally included in the offer of the "Anderson Place" for sale, and the bids and purchase were made on the same postulate, that the payment and report thereof were made on the same understanding, and that said forty acres was part of the consideration on which the three thousand dollars were promised and paid. The money being thus paid, received by the administrator and distributed among the next of kin, near or quite twenty years ago, they are estopped from claiming the land, or any interest therein. Having enjoyed their share of the proceeds of its sale, they can not be permitted, particularly after this long delay and acquiescence, to claim and recover the land itself.—*Butler v. O'Brien*, 5 Ala. 316; *Goodman v. Winter*, 64 Ala. 434.

The decree of the chancellor is reversed, and this court, proceeding to render the decree the chancellor should have rendered, doth order and decree that the title to the said forty acre tract of land, viz., the southwest quarter of the southeast quarter of section 26, township 17, range 3 west, be divested out of the heirs at law of James A. Mudd, and vested in the complainants in the present suit—Mrs. Mary E. Oden, Mrs. Mary C. Kirk, William A. Ware, Mrs. Sarah F. Allen, Susan C. Ware, Florence R. Dupuy, George W. Ware, and Mrs. Lou. Heath, in the proportion the law casts the title upon them on the death of James M. Ware intestate. But this decree is not to affect or disturb the right or title of any person or corporation to said land or any part thereof acquired from James M. Ware in his lifetime.—*Jones v. Woodstock Iron Co.*, 95 Ala. 551; 10 Southern Rep. 635.

Let the costs of the original suit be paid by complainants, and the costs of appeal by John W. Dupuy, Mrs. S. F. Wilson, Mrs. Sarah E. Parsons and Mrs. Mary J. Riley, adult heirs at law of Susan S. Dupuy, deceased.

A proper allowance to the guardian *ad litem* of the infant defendants, for the services rendered by him in the court below, is also adjudged against the complainants, as part of

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the decree against them, by the order of this court. But inasmuch as we have no information or *data* on which to fix the proper amount of such allowance, the cause is remanded that the Chancery Court may ascertain and decree a proper allowance to the guardian *ad litem* for his said services in that court.

Reversed, rendered, and, on a single point, remanded.

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Action of Assumpsit.

1. *Evidence ; contradictory statements.*—While contradictory statements made by a witness, when unexplained, may affect his credibility, they do not, of themselves, render the statements incompetent as evidence.

2. *Dissolution of partnership ; notice thereof.*—Where a partnership has been dissolved, constructive or implied notice of its dissolution will be sufficient as to all persons who have had no previous dealing with the firm ; but as to persons who have had previous dealing with it, its continuance will be presumed until actual notice of the dissolution be given, or such steps have been taken as to warrant the inference that such notice has been received.

3. *Account stated ; presumption of its correctness.*—If an account is rendered to a debtor, and he admits its correctness, or retaining it makes no objection within a reasonable time, he will be bound by it as an account stated, his silence in the latter case being construed as an implied admission of its correctness.

4. *Same.*—If a debtor to whom an account has been rendered objects to only one of the items thereof, he will be considered as admitting the correctness of the other items, to which no objection is interposed.

5. *Implied contract for work and labor done.*—Where one performs certain work for another with the latter's knowledge and assent, and it is accepted, it is not necessary that there should have been an express contract to bind the latter, as the law construes the acceptance of the work to be an implied contract therefor.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

The present action was brought by the appellee corporation against the appellants, to recover for the building of certain cotton presses, and counted on the common counts. The defendants pleaded the general issue, payment, and that the defendants, E. B. Joseph and J. A. Gaboury, as a partnership, never made any contract with the plaintiff ; and

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that if the presses were built by the plaintiff, they were built under a contract entered into between plaintiff and the Simplex Compress Manufacturing Company. The plaintiff replied to the plea denying the partnership, and set up by way of replication that the defendants, Joseph and Gaboury, did business as a firm under the firm name of Joseph, Gaboury & Co., and it was with that firm that the contract for the presses was made. The evidence tended to show that in April, 1886, Joseph, Gaboury & Co. contracted with the plaintiff to build for them a trial press. This press was built and completed in June, 18-6, was accepted and paid for by the defendants. The plaintiff's testimony tended to show that in June, 1886, Joseph and Gaboury made another contract with the plaintiff to build for them three more presses. This contract, it is contended by the defendants, was made, not with them as a partnership, but with Gaboury for the Simplex Compress Manufacturing Company, a corporation. It is not shown in the evidence when the partnership of Joseph, Gaboury & Co. was dissolved, if ever dissolved, or that the plaintiff corporation was ever informed that said partnership was dissolved.

For answer to the 9th interrogatory propounded by plaintiff to the witnesses Mirkil, Cornelius and Creager, asking how many presses the defendants employed the plaintiff to build for them, and how many were built, the witness Mirkil answered: "There appeared orders on the shop book for four presses—one original press and three subsequent. We built the original press complete before the other presses were ordered. Then we built and shipped two of the other three; . . . but the fourth press ordered is still in the yard in an incomplete state." To this same ninth interrogatory the witness Cornelius answered: "The defendants employed the plaintiff to build four presses for them. Three of which presses were completed, and the fourth press was about three-quarters completed, and is in this present unfinished state now at the Southwark Foundry and Machine Company. The presses were built in the summer of 1886." After several objections to portions of the depositions of these witnesses, the defendants moved to exclude the answer of the witness Cornelius to the 9th interrogatory. The court overruled the said motion, and the defendants duly excepted. It was also shown by the testimony of the plaintiff that it had done extra work on the three presses, which were ordered in June, 1886, at the suggestion of said Gaboury.

At the request of the plaintiff, the court gave to the jury
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the following written charges : (1.) "A partnership is bound for the acts of each of the partners done in the name, and apparently on account, of the firm, while it is supposed to exist; and to relieve themselves from this responsibility, they must give a reasonable notice that they are no longer partners." (2.) "If the jury believe from the evidence that the partnership of Joseph, Gaboury & Co. employed the plaintiff to build one press for them, and afterwards said partnership was dissolved, and after such dissolution the defendant Gaboury employed plaintiff to build other presses for said partnership, both of the defendants would be liable on such contract, if the plaintiff had no notice of the dissolution of said partnership, until they had done the work contracted with said Gaboury to be done for the said partnership." (3.) "That although the partnership of Joseph, Gaboury & Co. may have been dissolved in May or June in the year 1886, and if the plaintiff had no notice thereof until it did the work sued for, such dissolution would be no defense to this action." (4.) "If the defendant Gaboury, in behalf of the partnership of Joseph, Gaboury & Co., contracted with plaintiff the account sued on, after the dissolution of such partnership, and without any notice to plaintiff of the dissolution of such partnership, then it is no defense to the action that said partnership has been dissolved." (5.) "If a debtor to whom an account is rendered either admits its correctness, or retains it and makes no objection within a reasonable time, he will be bound by it as an account stated." (6.) "If the jury believe from the evidence that the plaintiff rendered or furnished a copy of its account on its books to defendant Gaboury, and Gaboury objected to certain items of said account as being incorrect, and that these were the only items objected to, this amounts to an admission that each and every other item in said account was correct." (7.) "If the jury believe from the evidence that a contract was made by defendants with plaintiff to build three compresses for the corporation known as the Simplex Compress Manufacturing Company on condition that the plaintiff make defendants or said corporation a proposition therefor, and that said proposition and said bond were not made, and that defendant Gaboury afterwards contracted with plaintiff to build three compresses for the partnership of Joseph, Gaboury & Co., the defendants would be liable under such contract, if the plaintiff had no notice of the dissolution of said partnership." (8.) "That a contract may be implied as well as expressed, and that if the plaintiff did work and labor for the defendants, with the knowledge and

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assent of the defendants, and they accepted it, it was not necessary that there should have been an express contract." The defendants separately excepted to the giving of each of these charges; and also reserved separate exceptions to the refusal of the court to give each of the following charges requested by them: (1.) "There is no evidence before the jury as to when the contract for the last three compresses was made, except the testimony of the witnesses Joseph and Gaboury, and the bond introduced in evidence; and if the jury believe the evidence, it proves that the contract for the last three compresses was made with the Simplex Compress Manufacturing Company." (2.) "If the jury believe from the evidence that the original partnership of Joseph, Gaboury & Co. was dissolved in or about September, A. D., 1886, and that said partnership was confined to the matters set forth in the partnership agreement introduced in evidence, and that Joseph, when the account against Joseph, Gaboury & Co. was presented to him, claimed that the account should have been against the Simplex Compress Manufacturing Company, no admissions made by Gaboury, if the jury found he made any, are binding on Joseph to fix a liability on him therefor." (3.) "If the first contract with plaintiff was made in the name of Joseph, Gaboury & Co., and the second contract was not made in the name of Joseph, Gaboury & Co., but under a different name, this change of name is of itself sufficient to put the plaintiff on notice that they were dealing with a different concern; and upon this state of facts, if the jury find them to exist, the law read by plaintiff's counsel, as to the necessity of giving notice of the dissolution of the firm of Joseph, Gaboury & Co., has no application whatever to the case."

There was judgment for the plaintiff in the sum of \$7,473.75. The defendants prosecute this appeal, and assign as error the court's refusal to strike out the answer of the witness Cornelius to the ninth interrogatory, and the court's giving of the charges requested by the plaintiff, and the refusal to give the charges asked by them.

JONES & FALKNER, for appellants.

ARRINGTON & GRAHAM, *contra*.

COLEMAN, J.—The suit is in assumpsit against appellants as a partnership. The material issues of fact presented by the pleadings were, whether the contract, the foundation of the suit, was made with the defendant part-

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nership, or made with the Simplex Compress Manufacturing Company, a corporation formed after the dissolution of the partnership, and which succeeded it; and if made after the dissolution of the partnership, whether plaintiffs had notice that the partnership had been dissolved. There was evidence which tended to sustain the special plea of defendants, and there was evidence which tended to support plaintiff's replication to the plea.

There was no error in overruling the motion to exclude the answer of the witness Cornelius to the 9th interrogatory. Contradictory statements made by a witness, unexplained, may affect his credibility, but do not render the statements incompetent as evidence.

In the case of *Mauldin v. Branch Bank at Mobile*, 2 Ala. 502, it was held, that "a dissolution of a partnership may take place *inter partes*, and yet the connection continue as it respects the rest of the world. In respect to all persons who have had no previous dealings with the concern, a constructive or implied notice of its dissolution will be sufficient. But as to persons who have had dealings with the firm, during its continuance, it is requisite, that actual notice be given, or that such steps have been taken as to warrant the inference that it was received by the creditor." The rule rests upon the principle, that the partnership being once known to exist, its continuance will be presumed in favor of third persons, who have had dealings with it as a partnership, until notice of its dissolution has been brought home to them.

In the case of *Burns v. Campbell*, 71 Ala. 286, it was held that, "if a debtor to whom an account is rendered either admits its correctness, or retains it and makes no objection within a reasonable time, he will be bound by it as an account stated, his silence in the latter case being presumptively construed into an acquiescence in its justness," citing *Langdon v. Roane*, 6 Ala. 518. It is further held in the same opinion, that if *one item only is objected to*, this is an admission of the correctness of the other items to which no objection is interposed.

These principles of law sustain the first seven charges given for plaintiff. The eighth charge needs no citation of authority to sustain it.

In reply to the 9th interrogatory, the witness Cornelius testified directly that the *defendants* employed the plaintiff to *build four* presses for them; and the witness Mirkil testifies as to the time the contract was made. The first charge asked for by defendants was, therefore, properly refused.

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We find no evidence in the record, which would have authorized the giving of either of the charges requested by defendants.

The judgment of the lower court is affirmed.

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Bill in Equity to Enforce a Trust upon Land.

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1. *Devise to executor in trust for special purposes, creates a personal trust; enforced by a court of equity.*—A devise to executors “hereinafter named, in trust for uses and purposes,” with special directions as to the management of the testator’s property and for its ultimate distribution among the devisees under the will, creates in the executor a personal trust, as distinct from executorial duties; and for the enforcement of such a trust resort must be had to a court of equity, a Probate Court having no jurisdiction over it.

2. *Testamentary trusts; jurisdiction of Probate Court.*—A Probate Court has no jurisdiction to enforce and settle a trust created by will; but if the trust is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person, as executor and as trustee, are not so blended that they can not be distinguished or separated from each other, the Probate Court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as the trustee under the will.

3. *Same.*—When one person is appointed executor, and is also made the trustee under the will with powers unconnected with his ordinary duties as executor, the Probate Court can exercise the same control over him as an executor merely, as it could if he alone had been made the executor, and the special trust had been conferred upon some other person.

4. *Same; jurisdiction of Chancery Court.*—If a special trust or power is attached to the executorial office, and is not personal to him who is named as executor and trustee, then the Probate Court has no jurisdiction to execute the will, as the administration of the estate under the will involves the execution of a trust, which can only be enforced in a court of equity.

5. *Sale of decedent’s lands; estoppel.*—Persons who are parties to the final settlement of an executorship are estopped, so long as such settlement remains unimpeached by direct attack, from claiming in a court of equity the same lands, from the sale of which they received the benefit, and the proceeds of which were fully accounted for to them on such final settlement.

APPEAL from the Chancery Court of Cleburne.

Heard before the Hon. S. K. McSPADEN.

The bill in this case was filed on June 22, 1889, by the appellees, who were the brothers and sisters of Matthew Creamer, deceased, and the descendants of such brothers

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and sisters who had died, against the appellant, David Creamer, as executor and trustee under the last will and testament of Matthew Creamer, deceased.

The prayer of the bill was that the Chancery Court would take charge of so much of the estate of Matthew Creamer, deceased, as was involved in this controversy, and hold it subject to the direction of the court as a trust estate, and that, upon final hearing of the cause, the property be decreed to be sold, and the proceeds of such sale be distributed among the devisees under the will of Matthew Creamer, in accordance with the provisions of said will.

The grounds for this relief, as averred in the bill, were, that Matthew Creamer died seized of the lands involved in this controversy; that under his last will and testament he appointed David Creamer, as executor and trustee to carry out the provisions of said will; that under said will the complainants were the *cestuis que trust* and entitled to their distributive portions of the estate of Matthew Creamer; that the said David Creamer qualified as executor of said will, and under its provisions took possession of the property involved in this suit, but, not regarding the provisions and requirements of said will, that he should hold and control the same for the benefit of the complainants and himself, said David Creamer sold the said lands and became the purchaser thereof; that said sale was an absolute nullity and void, and that, therefore, the said David Creamer still holds the said property as a trustee, under the will of Matthew Creamer, deceased, for the benefit of the complainants.

The bill was demurred to, and a motion made to dismiss the same for the want of equity. This demurrer and motion were overruled. The facts disclosed by the record are as follows: Matthew Creamer died testate in the State of California, seized of the lands described in the bill. The will of said Matthew Creamer was admitted to probate in the Probate Court of Nevada county, California, October 27, 1867, and a certified copy of said will was duly admitted to probate in the Probate Court of Cleburne county, Alabama. Under this will two residents of California were named as executors in that State, and the respondent, David Creamer, a resident of Alabama, was named as sole executor in the States of Alabama and Georgia, with the express provision that he should be accountable only for what moneys and property might come into his hands. David Creamer qualified as executor, and letters testamentary were granted to him on July 15, 1868, whereupon he entered upon and un-

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dertook the discharge of the duties of executorship and of said trust.

The provisions of the will as to the trust were as follows : "I give, devise and bequeath to my executors, hereinafter named, all and singular my property, real and personal, wheresoever situated and all moneys belonging to me of which I may die possessed, in trust, nevertheless and to and for the following uses and purposes, viz., I direct my said executors to take charge of and to carry on my business as though I was living and personally present, and to use any moneys that may come into their hands belonging to me, or so much thereof as may be in their judgment necessary to carry on my business, make improvements, extension or to purchase any property that may add value to my present property. . . . It is my request that my said executors shall manage all my business in the best manner according to their judgment for the benefit of my beloved father and mother, brothers and sisters, and to give them possession of moneys and real and personal property, when demanded in person or by a lawfully appointed attorney, all or any one of them their *pro rata* of the estate, as follows : " Then follows the several bequests, with certain directions to the executors.

On December 8, 1870, David Creamer, sold certain of the lands, and on December 7, 1871, he sold the remainder of the lands owned by Matthew Creamer in Alabama and Georgia. At each of these sales he became the purchaser of all the lands sold, and on December 7, 1871, he reported to the Probate Court of Cleburne county, Alabama, the sale of said lands, and the payment of the purchase-money therefor; but no order confirming the sale and ordering a deed was then made. On June 20, 1872, the said David Creamer filed his accounts and vouchers in the Probate Court of Cleburne county, Alabama, for a final settlement of his executorship, and in his petition therefor the devisees under the will of Matthew Creamer were named. On November 19, 1872, the Probate Court, by an order, which recited that due and proper notice had been given, passed upon and allowed the accounts and vouchers of said David Creamer as executor, and declared a final settlement of said executorship.

On October 15, 1883, the said David Creamer again filed in the Probate Court of Cleburne county, Alabama, a report of the sale of said lands and the payment of the purchase-money therefor, and prayed for the appointment of an administrator *ad litem* to execute titles to him to said lands,

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and that an order be made directing the execution of said titles; but no notice of this application was given to the heirs and devisees under the will of Matthew Creamer. In response to this application, the Probate Court of Cleburne county, appointed A. A. Hurst administrator *ad litem*, and directed that he execute a deed, conveying the title to the property alleged to have been purchased to David Creamer; and on January 1, 1884, said Hurst, as administrator *ad litem*, executed to said David Creamer a deed conveying the said land.

The testimony for the complainants tended to show that, until a short time prior to the filing of the original bill in this case, they had no knowledge that the lands in controversy had been sold, or that David Creamer claimed them as his own. The respondent in his answer denied the right, title and interest of the complainants in the lands in controversy, and claimed the same under his purchase at the sale above mentioned, and under his deed from Hurst, administrator *ad litem*. By pleas, the respondent set up the defense of the statute of limitations of ten years. The testimony for David Creamer was in conflict with that of the complainants, and tended to show that he did inform the complainants of the sale of the land, and his purchase of the same, and that they knew he claimed the lands as his own.

On the final submission of the cause, upon the pleadings and proof, the chancellor decreed that the complainants were entitled to the relief prayed for, and that the lands be sold for division, and ordered a reference to the register to state an account between the parties for rents and profits.

The respondent now brings this appeal, and assigns as error the decree of the chancellor overruling his demurrers and motion to dismiss, and also the final decree rendered in the cause.

AIKEN & BURTON, for appellant.—The complainants were not entitled to the relief prayed for in their bill.—*Pinney v. Werborn*, 72 Ala. 58; *Werborn v. Austin*, 77 Ala. 381; *Gamble v. Jordan*, 54 Ala. 432; *Waring v. Lewis*, 53 Ala. 615; *Otis v. Dargan*, 53 Ala. 178.

MERRILL & BRIDGES and ELLIS, BABER & JOHNSON, *contra*.

1. The will of Matthew Creamer, deceased, created a trust estate in the hands of David Creamer.—*McCarthy v. McCarthy*, 74 Ala. 546; *Cresswell's Adm'r. v. Jones & Dunn*, 68 Ala. 420; *Hinson v. Williamson*, 74 Ala. 180; *Perkins v.*

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Lewis, et als. 41 Ala. 649; 1 Perry on Trusts, § 82. 2. A trustee can not purchase the trust property, and claim title to the same in himself to the exclusion of the *cestuis que trust*.—*McCarthy v. McCarthy*, 74 Ala. 546; 1 Perry on Trusts, §§ 194, 197, 200, 209. 3. The Probate Court was without jurisdiction to make any order or decree in the matter of this estate.—*Hinson v. Williamson*, 74 Ala. 180; *McCarthy v. McCarthy*, 74 Ala. 546; *Johnson v. Longmire*, 39 Ala. 143; *Harrison v. Harrison*, 9 Ala. 470; *Leavens v. Butler*, 8 Porter 380; *Portis v. Creagh*, 4 Porter 332. 4. The decree of the Probate Court, rendered October 15, 1883, ordering the execution of a deed to David Creamer, is void. *Ligon v. Ligon*, 84 Ala. 555. 5. The statute of limitations does not apply in favor of the trustee against the *cestuis que trust*.—*McCarthy v. McCarthy*, 74 Ala. 546; *DeBardelaben v. Stoudenmire*, 82 Ala. 574; *Maurry's Adm'r. v. Mason's Adm'r.*, 8 Porter 211; *Holt v. Wilson*, 75 Ala. 58.

WALKER, J.—Matthew Creamer by his last will devised all his property to his executors in trust for uses and purposes specified in the will. The executors were authorized in the exercise of their judgment, if they should deem it to the interest of the estate, to sell any of the property of the estate at private or public sale, and to invest or dispose of the proceeds of such sales in carrying out the provisions of the trust. Two residents of California, where the testator resided, were named as executors in that State, the will expressly providing that they were to be accountable only for the moneys or property which they might receive; while the testator's brother, David Creamer, a resident of Alabama, and the appellant in this case, was named as sole executor in the States of Alabama and Georgia, the will also expressly providing that he should be accountable only for the moneys and property coming to his hands.

We understand from the provisions of the will fixing the powers and duties of the executors that it was the intention of the testator to confer upon the single executor named for the States of Alabama and Georgia, all those powers and duties so far as they were applicable to the part of the testator's property situated in those States; while, as to his property situated elsewhere, like powers and duties were conferred upon the persons who were named as executors in the State of the testator's residence.

The appellant, David Creamer, qualified as executor under the will, and took charge of the testator's property in the States of Alabama and Georgia. This bill is filed by bene-

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ficiaries under the will to enforce the trusts thereof upon lands situated in this State. The appellant, who was the defendant below, contends that more than ten years before the bill was filed, at a sale made by himself under the power conferred by the will, he purchased the lands upon which the trust is sought to be enforced, accounted for the purchase price thereof in a settlement of his executorship in the Probate Court, and since the date of such purchase has had possession of the lands, claiming them adversely as his individual property, freed from any trust in favor of the complainants.

The testator's property in Alabama and Georgia was devised to the executor named for those States. That person's functions under the will reached beyond those of a mere executor. He was charged with the execution of a trust for the management of the testator's property after his death, and for its ultimate distribution among the beneficiaries of his bounty. He occupied a dual relation to the will—that of executor proper, and that of trustee. It is in his character as a devisee in trust that he was invested with general powers of management, of selling property and reinvesting the proceeds of sales, and of paying and settling money or other property in carrying out the purposes of the trust. These powers clearly imply a special personal confidence in the person upon whom they were conferred. The trust was personal in its character, and he who was named as executor might continue to hold the land as trustee, after his functions as executor had terminated. The Probate Court has no jurisdiction over such a trust. For its enforcement resort must be had to a court of equity.—*Proctor v. Scharpf*, 80 Ala. 227; *McCarthy v. McCarthy*, 74 Ala. 546; *Perkins v. Lewis*, 41 Ala. 649.

The fact, however, that a testator by his will devolves such a special personal trust or power upon the person who is named as executor does not necessarily oust the jurisdiction of the Probate Court over the administration of the estate. If the trust or power is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person in his two characters, as executor and as trustee, are not so blended and mingled that they can not be distinguished or separated, the one from the other, then the Probate Court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity as a trustee under the will. But if such special trust or power is attached to the executorial office or

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character, and is not personal to him who is named as executor and trustee, then the jurisdiction of the Probate Court is ousted, as the administration of the estate under the will involves the execution of a trust of which only a court of equity can take cognizance.—*Harland v. Person*, 93 Ala. 273; *Hinson v. Williamson*, 74 Ala. 180; *Foxworth v. White*, 72 Ala. 224. When one person is appointed executor, and is also made a trustee with powers unconnected with his ordinary duties as an executor, the Probate Court can exercise the same control over him as an executor merely as it could if he had been made the executor simply, and the special trust in question had been conferred upon some other person.

In the present case the special directions of the will are not in reference to the discharge of ordinary executorial functions. The devise was not made, and the powers of the devisees in trust were not conferred, for the purposes of an ordinary administration, but in furtherance of a scheme for the management of the testator's property after his death, and for its ultimate appropriation in carrying out the purposes of the trust. The special trust might have remained wholly unexecuted until after the merely executorial functions had been fully discharged. The devise was not to the executors as such, but to the same persons as trustees. Neither the trust nor the powers and duties attached to it would have devolved upon an administrator with the will annexed. Those powers and duties were personal trusts, confided to the same persons who were named as executors; but were not mere executorial duties attached to the executorial office. The fact that the same person who was executor was also a trustee of such an independent trust did not oust the jurisdiction of the Probate Court as to such matters as pertained to his purely executorial functions. The Probate Court had jurisdiction of David Creamer's settlement as executor merely.—*Harland v. Person*, *supra*; *Ex parte Dickson*, 64 Ala. 188.

David Creamer made a final settlement of his executorship in the Probate Court of Cleburne county. Notice of that settlement was given in pursuance of the terms of the special statute then of force in that county.—Acts of Ala. 1869-70, p. 337. Some, at least, of the complainants were regularly made parties to that settlement, so as to be bound thereby. In that settlement the executor accounted for the amounts of his bids at the sales made by himself of the property now sought to be subjected to the trusts of the will. Persons who were parties to that settlement could

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not, so long as it remains unimpeached by direct attack, claim, in a court of equity, the same land of the sale of which they received the benefit, by treating the purchase-money therefor as assets, which were fully accounted for to them on such final settlement. They could not at once accept the benefits of the sales and repudiate them as of no effect. *Robertson v. Bradford*, 73 Ala. 116; *Bell v. Craig*, 52 Ala. 215; *Powell v. Powell*, 80 Ala. 11. The effect of that settlement as an estoppel is not lessened by the consideration that the sales in question were voidable, and that the Probate Court was without jurisdiction in regard to them. No intervention of any court was necessary to the due exercise of the powers confided to the executors in their characters as devisees in trust. Only a court of equity had jurisdiction over them as trustees of a trust independent of the executorship. But it was not necessary that that jurisdiction should be called into exercise to enable them to execute the powers conferred upon them. The jurisdiction of the Probate Court over David Creamer's settlement, as executor merely, was not affected by the circumstance that assets, accounted for on that settlement, came to his hands as the result of sales under a trust power, as to the exercise of which the Probate Court was without jurisdiction. It is not because those sales are recognized as valid that the complainants can not obtain the relief sought in this case. It is because they can not retain the benefit of them as valid sales, and at the same time repudiate them as invalid.

The complainants, or some of them, may desire to make a direct attack upon the settlement in the Probate Court. Possibly, this may be done by appropriate averments and proof in this case. The cause will be remanded to afford them an opportunity to take such steps as they may be advised are proper to avoid the effect of that settlement. In the present state of the pleadings and proof the bill should be dismissed.

Reversed and remanded.

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Sullivan et al. v. McLaughlin et al.*Bill in Equity to Set Aside Sale Under a Mortgage.*

1. *Construction of deed.*—In the construction of a deed, the controlling inquiry is the intention of the grantor, and in ascertaining such intent the deed is to be interpreted as a whole, and the subject matter and the surrounding circumstances are to be considered; and if the deed bears on its face evidence that it was drawn up by an unskilled draughtsman, unacquainted with the technical meaning and force of the terms used, greater latitude of construction must be indulged than in cases where the instrument appears to be skillfully drawn.

2. *When "heirs of her body" are terms of purchase.*—In a deed of gift from a husband, in which he conveys to his wife "and the heirs of her body by myself as husband," especially excluding in said deed all rights of inheritance or other rights of the heirs of the wife by any other person, and when there were living children of the grantor by his said wife at the time of the conveyance, the terms used must be construed, not as words of limitation and inheritance, but as descriptive of a class of persons to take under the deed as purchasers; and the estate so created in the wife is not an estate tail.

3. *Estoppel.*—When the respondent to a bill to set aside a sale under a mortgage claims title to and through a purchaser at the mortgage sale, the mortgage having been executed by the grantor of the complainant, he is estopped from denying that the mortgagor had title to the land, he being the common source of title to both parties.

4. *When a sale under mortgage premature.*—The recitals in a mortgage that it was given to secure an indebtedness evidenced by "two promissory notes, . . . payable as described in a conveyance of the date" of the execution of the mortgage, and that it was given to secure "the true and prompt payment of the same" by a certain day mentioned in the mortgage, in the absence of the conveyance referred to and of facts showing that one of the notes fell due prior to the date named in the mortgage, will be construed to mean that if the mortgage debt, or any part thereof, remained unpaid after the day named in the mortgage, the mortgagee would have the right to sell under the power; and a sale prior to that date is premature.

APPEAL from the Chancery Court of St. Clair.

Heard before the Hon. S. K. McSPADEN.

The bill in this case was filed March 8, 1890, by the appellants against the appellees. It appears from the allegations of the bill, that on March 8, 1880, Wesley Goodwin, being seized and possessed of certain lands described in the bill, executed together with his wife, Melissa D. Goodwin, to James McLaughlin, and W. S. Forman, as administrators of the estate of James Forman, deceased, a mortgage deed

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for \$1,000 to secure the payment of the purchase-money for said land, said mortgage debt, as recited therein, being due and payable October 1st, 1882; that in 1880 or 1881, Wesley Goodwin paid on said mortgage debt \$90; that afterwards, on January 5th, 1881, the said Wesley Goodwin executed a deed of conveyance to said land, the granting clause in said deed being as follows: "I, Wesley Goodwin, for the love and affection I have for my wife Melissa D. Goodwin, as well as for other good and valuable consideration, do hereby give, grant, enfeoff and convey to the said Melissa D. Goodwin and the heirs of her body by myself as husband," certain described land. The *habendum* clause of said deed is set out in the opinion. The bill further alleges that in May, 1881, the said Wesley Goodwin died intestate, leaving surviving him his wife, Melissa D. Goodwin, and the following children by his said wife: Nelson Goodwin, Talley Goodwin, Leander Goodwin and Laura Keith, which children were in being at the time the said deed was executed by Wesley Goodwin, on January 5th, 1881; and that they are the only children Wesley Goodwin had by his wife, Melissa Goodwin; and the bill avers that the said Melissa Goodwin and the said children are the grantees in said deed. The bill further avers that in December, 1881, while Melissa Goodwin and her children were in the possession of the said land, the said McLaughlin and W. S. Forman, as mortgagees aforesaid, demanded, and took from her the possession of the land; that they went into possession thereof; and that in January, 1882, the said James McLaughlin and W. S. Forman proceeded to advertise the said land for sale as provided in their said mortgage, and on February 3, 1882, they sold the said land under the power of sale contained in the mortgage for \$1,705, which sum was paid by John Keith, and a deed executed to him by the said mortgagees. It is further averred that said John Keith went into possession of said land, and continued in possession thereof until February, 1887, when he sold the same to T. T. Scott, who went into immediate possession, and has been in possession thereof ever since. The said Melissa D. Goodwin, who is now Melissa D. Sullivan, and the above mentioned children of her and the said Wesley Goodwin, deceased, are the complainants in the present bill; and seek to have the sale made by the administrators under the power contained in the mortgage, on February 3, 1882, set aside, and to have the rent of said premises from that time, with the interest, applied to the amount ascertained to be due upon the mortgage debt, and, upon the payment by complainants of any other amount

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which may be found to be due thereon, to have said mortgage cancelled and removed as a cloud upon complainants' title. The said administrators, and the heirs at law of James Forman, deceased, and the said John Keith, and T. T. Scott are made parties defendant. All of the defendants except T. T. Scott joined in a demurrer to the bill as amended, and assigned as cause thereof the following grounds: 1st, that complainants have a plain and adequate remedy at law; 2d, that there is no equity in the bill, because the complainants show therein that the lands in controversy were sold by the administrators under a power of sale contained in the mortgage, and that more than two years have elapsed since the said sale; 3d, that the complainants fail to show that they have any present interest or estate in the lands in controversy; 4th, the same grounds as the third; 5th, that they fail to aver or show that the defendants, James M. McLaughlin and W. S. Forman, as administrators of the estate of James Forman, deceased, or otherwise, had any lawful authority to sell the land, the subject-matter of this suit, so as to invest Wesley Goodwin, under whom complainants claim, with any title to said land; 6th, that the complainants show by their bill that the title to the land in controversy has never in any lawful or equitable way been divested out of the heirs of James Forman, deceased; 7th, that the complainants fail to aver or show when the first note mentioned in the mortgage fell due; 8th, that the bill fails to show that no default was made by Wesley Goodwin, or those claiming under him, in the payment of the first note mentioned, before the sale by the mortgagees on February 3, 1882; 9th, that the bill fails to show that there was not such default made in the payment of the mortgage debt or any part thereof, prior to February, 1882, as would authorize the mortgagees, McLaughlin and Forman, to foreclose their mortgage; 10th, the bill fails to show that the sale made by the mortgagees on February 3, 1882, was not binding and valid under the terms of the mortgage; 11th, there is a misjoinder in the parties complainant, in that said Laura E. Keith, Nelson Goodwin, Talley Goodwin and Leander Goodwin, are not proper parties complainant to the suit; 12th, because the bill does not show that the above mentioned children of Wesley and Melissa D. Goodwin are proper parties complainant to this suit; 13th, that the bill shows that the said Melissa D. Sullivan is the only proper party complainant to this suit; and 14th, there is a misjoinder of parties defendant to this suit, in this, that the children of James Forman, deceased, are not proper parties defendant. The defendant, T. T.

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Scott, demurred to the bill on the following ground: "That it appears from and by the bill that the complainants Laura E. Keith, Nelson Goodwin, Talley Goodwin and Leander Goodwin have no interest in the matter in controversy, and are improper parties to this suit."

Upon the submission of the cause on the demurrers, the chancellor decreed that the demurrer of the defendant Scott was well taken, and sustained the same. He also sustained the 5, 6, 7, 8, 9, 10, 11, 12, and 13, grounds of demurrer interposed by the other defendants, and overruled the 1, 2, 3, 4 and 14, grounds of said demurrer. This appeal is prosecuted by the complainants in the court below; and the chancellor's decree upon the demurrers is assigned as error.

M. M. SMITH, for appellant.—(1.) The respondents were estopped from denying title of Wesley Goodwin, the mortgagor.—*Pollard v. Cocke*, 19 Ala. 188; *Houston v. Farris*, 71 Ala. 570; *Tenn. & Coosa R. R. Co. v. East Ala. R. R. Co.*, 75 Ala. 516. (2) The mortgage was prematurely foreclosed. *McLean v. Presley's Admrs.*, 56 Ala. 211; *Johnson v. Buckhauls*, 77 Ala. 276. (3) There was no misjoinder of parties. *Fellows v. Tann*, 9 Ala. 999; *Powell v. Glenn*, 21 Ala. 458; *Williams v. McConico*, 36 Ala. 22; *Robertson v. Johnston*, 36 Ala. 197; *Sprague v. Tyson*, 44 Ala. 228; *May v. Richie*, 65 Ala. 602; *Powe v. McLeod*, 76 Ala. 418; *Wikle v. McGraw*, 91 Ala. 631.

W. M. BROOKS, and JOHN W. INZER, *contra*, cited *Musina v. Bartlett*, 8 Port. 277; *Ewing v. Standifur*, 18 Ala. 400; *Lloyd v. Rambo*, 35 Ala. 709; *Young v. Kinnebrew*, 36 Ala. 97; *McLean v. Presley's Admrs.*, 56 Ala. 211; *Smith v. Greer*, 88 Ala. 414; 5 Brick. Dig., p. 301, §§ 70-74.

THORINGTON, J.—The bill in this case seeks to charge mortgagees in possession with rents, which it is alleged are equal in amount to the mortgage debt, and to have the mortgage satisfied from such rents, and cancelled as a cloud on complainants' title; and there is an offer in the bill to pay any balance of the mortgage debt, if the rents should prove insufficient for that purpose.

The principal question for the decision of this court involves the construction of a deed made by Wesley Goodwin, January 11, 1881, to his wife and children, who are the complainants, and filed the bill after his death. The deed, in consideration of natural love and affection, conveys unto "the said Melissa Goodwin and the heirs of her body by

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myself as husband the following described property," being the same set forth in the bill. The *habendum* and *tenendum* clause of the deed is as follows, to-wit: "To have and to hold to the said Melissa D. Goodwin and the heirs of her body by myself as husband, and to her assigns, in the right and for the interest of her said heirs as aforesaid, hereby specially excluding all and every right of inheritance or other rights of the heirs of Melissa D. Goodwin by any person or persons other than myself."

By an amendment to the bill it is averred that Wesley Goodwin, the grantor, was at the date of the deed in declining health; that the property conveyed constituted substantially all the property he then owned; that his wife, one of the grantees, then had living children by a former husband; that Wesley Goodwin's desire and intention in executing the deed was to provide for his wife and his own children by her; and that the words in the deed, "heirs of her body by myself as husband," were so used "to show that all other heirs and children of his said wife were excluded from taking or holding any interest in said lands under or by virtue of said deed;" that it was the grantor's intention to convey said property by said deed to his wife and children jointly, and "the draughtsman thereof inadvertently used in said deed the term *heirs of her body by him as husband*, instead of *her children by him*;" that said grantor was illiterate and unlearned in legal terms, and, not knowing the effect of the technical terms used in the deed, supposed and believed he was conveying the lands to his wife and her children by him as husband, who are complainants in the bill, and were living when the deed was made.

Demurrers to the bill, before and after the amendment thereto, were filed by respondents, on the ground of misjoinder of parties complainant, and also on other grounds that will be briefly noticed hereinafter.

The decree of the Chancery Court on the demurrers can only be sustained on the theory that the deed in question creates in Mrs. Goodwin an estate-tail, which, by the statute (Code 1886, § 1825), is converted into an absolute fee-simple estate; that her children, therefore, having no interest in the land, are improperly joined with her as complainants in the suit.

The controlling inquiry is as to the intention of the grantor. What estate and interest did he intend to create by the deed? In ascertaining such intent, the deed is to be interpreted as a whole, and the subject-matter and surrounding circumstances are to be considered. In looking to the

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whole structure of the deed, if it is found to bear on its face evidence that the draughtsman was not skilled in drawing such instrument, that he was unacquainted with the technical meaning and force of the terms used, greater latitude of construction must be indulged, than in cases where the instrument appears to have been skillfully drawn by one acquainted with the force and meaning of the technical expressions employed.

Wesley Goodwin, the grantor in this deed, had married a widow with children by a former husband; there were also children of her marriage with him, and children of each class were living at the time of the execution of the deed. The property conveyed constituted substantially all the grantor's estate; he was in failing health, was illiterate, and unacquainted with the meaning and effect of technical terms in conveyances; and in some particulars the deed is inartificially drawn. Whatever technical, legal operation and effect the language employed in the deed may have in and of itself, when subjected to the light of these surrounding or attendant circumstances, it can have but one meaning. It is obvious that the intention of the grantor was to make provision to the extent of his means, and in his life-time, for his wife and his own children by her, to the exclusion of her children by a former husband. The consideration of the deed is mutual love and affection, and, under the circumstances, this was the most natural direction and expression of the grantor's bounty; and we think the deed may be so construed as to render it effectual to carry out that purpose.

The language in the deed, "heirs of her body by myself as husband," unrestricted by any other terms of the deed; and in the absence of living children of the wife by the grantor, would create an estate-tail special at the common law, upon which our statute (Code, 1886, § 1825), would operate.—1 Wash. on Real Prop., (5 Ed.), p. 108, § 33; *May v. Ritchie*, 65 Ala. 602. But, it being evident that the word "heirs" is used as the equivalent of children, and there being living children of the grantor by his wife Melissa, at the time the deed was executed, the terms employed in the deed, and quoted above, must be construed, not as words of limitation and inheritance, but as a description of a class of persons to take under the deed as purchasers, and the language is sufficiently definite and certain to be operative for that purpose.—*Slayton v. Blount*, 93 Ala. 575; *Hamilton v. Pitcher*, 53 Mo. 334; 1 Devlin on Deeds, § 184. The deed, therefore, did not create an estate-tail in Mrs. Goodwin, but it vested

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the property in her and her children by the grantor, then living; and there being nothing in the deed from which it can be inferred that the grantor intended to postpone the interest of the children, the title to the property vested in them immediately, jointly and equally with their mother; but whether subject to diminution by the subsequent birth of other children of her marriage with the grantor, we do not decide, as it is not a question in this case.—*Wikle v. McGraw*, 91 Ala. 631; *May v. Ritchie*, 65 Ala. 602; *Varner v. Young's Executor*, 56 Ala. 260; *Robertson v. Pettibone & Johnson*, 36 Ala. 197; *Vangant v. Morris*, 25 Ala. 285; *Powell v. Glenn*, 21 Ala. 459; *Mims v. Stewart*, 21 Ala. 682.

In the case of *Varner v. Young's Executor*, *supra*, the language of the deed construed is substantially the same as in the deed we are now considering, and there was a living child of the grantee at the time the deed was executed. The court said: "The words by which the slaves are conveyed, if employed in a conveyance of title to land, would have created an estate-tail at common law." This was intended simply as a declaration of the legal effect and operation of the words or terms then under consideration, when employed in conveyances of land generally, unrestricted or unexplained by other portions of the instrument, and without reference to whether there were or not living children of the grantee at the date of the conveyance. The case is, therefore, not to be considered as asserting a doctrine contrary to that herein announced.

It follows from what has been said that the Chancery Court erred in sustaining the several grounds of demurrer for misjoinder of parties complainant.

The fact that the deed was made directly to Mrs. Goodwin by her husband, instead of by the intervention of a third person as trustee, and that, therefore, only an equity was thereby vested in her and not the legal title, can not change the result. Whatever *residuum* of title may have continued in the husband after the execution of the deed, passed out of him by his death, and into his heirs before the bill was filed; so that the complainants, who are shown to be the only children of the grantor, and their mother, Mrs. Goodwin, represented the entire fee in the land, and were properly joined as complainants.—*Powe v. McLeod*, 76 Ala. 418.

What has been said disposes of the demurrer filed by appellee, Scott, and also the 11th, 12th and 13th grounds of the demurrer filed by the other appellees and sustained by the Chancery Court.

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The fifth and sixth grounds of the last mentioned demurrer were improperly sustained, for the reason that it does not appear from the bill or the exhibits thereto that the land was sold by McLaughlin and Forman, as administrators of the estate of James Forman, deceased, or that the title to the land mortgaged was ever in James Forman. If, however, taking the bill most strongly against the pleader, the mere recital in the mortgage, that it was executed to secure the purchase-money for the land, gives rise to the presumption that the lands were sold by the administrators, instead of by their intestate in his life-time, still, all the respondents who file the demurrers have, as the bill shows, no claim or interest in the property except through Wesley Goodwin, the grantor in the deed to appellants; he, therefore, being the common source through which all the parties claim, they are estopped from denying that he had title to the lands.—*Tenn. & Coosa R. R. Co. v. East Ala. R. R. Co.*, 75 Ala. 516; *Houston v. Farris*, 71 Ala. 570; *Pollard v. Cocke*, 19 Ala. 188.

The 7th, 8th, 9th and 10th grounds of demurrer were also improperly sustained. It appears distinctly from the allegations of the bill that the entire sum secured by the mortgage became due by its express terms on the 1st day of October, 1882, for all purposes of foreclosure, and there is nothing in the exhibits to the bill to contradict or neutralize that averment. The language of the mortgage is: "Whereas we are indebted . . . in the sum of one thousand dollars in two promissory notes, five hundred dollars each, and payable as described in conveyance of this date; . . . now, therefore, to secure said James M. McLaughlin and William S. Forman in the true and prompt payment of the same on the 1st day of October, 1882," &c. And further, "but if default be made in the payment of said amount, or any part thereof, then" &c. Without intending to indicate what our ruling on this question would be, if it appeared from the allegations of the bill, or the exhibits thereto, that one of the mortgage notes fell due prior to February, 1882, when the mortgage sale was made, we are constrained to hold, in the absence of such fact, that the language quoted above simply means that, if the mortgage debt or any part thereof remained unpaid after the 1st day of October, 1882, the mortgagee should have the right to sell under the power contained in the mortgage. The conveyance referred to in the mortgage, as containing a description of the notes secured by the mortgage, is not exhibited with the bill, and in its absence it can not be assumed,

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in the face of the positive allegations of the bill to the contrary, that either note secured by the mortgage matured prior to the 1st day of October, 1882. Taking the allegations of the bill to be true, as we must on demurrer, the foreclosure was premature and unauthorized.

The Chancery Court erred in its decree sustaining the grounds of demurrer, as shown by the assignments of error, and its decree is accordingly reversed and the cause remanded.

Reversed and remanded.

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Bill in Equity to Set Aside Sale by a Corporation as Fraudulent.

1. *The capital stock of a corporation a trust fund in the hands of directors.*—The governing body or directors of a corporation hold the capital stock therein as a trust fund, in order that it may be preserved and administered, primarily, for the benefit of creditors, and secondarily, for the benefit of the stockholders.

2. *Insolvent corporation; officer or director can not be a preferred creditor.*—A member of the governing body of an insolvent corporation, of which corporation he is a non-secured creditor, can not be made a preferred creditor in the administration or disposition of the corporate assets; but the assets must be distributed *pro rata* among all the non-secured creditors. If, however, valid liens have been created in favor of such officer or member, supervening insolvency can not destroy or impair them.

3. *Same.*—The directors or officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to the interests of its creditors; and if they are themselves creditors, while the insolvent corporation is under their management, they can not secure to themselves any preferment or advantage over other creditors.

4. *When corporation is insolvent.*—A corporation is insolvent, when its assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is about to take a step, which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassment is such that early suspension and failure must ensue.

APPEAL from the City Court of Decatur, sitting in equity.
Heard before the Hon. W. H. SIMPSON.

The bill in this case was filed by the appellee, W. W. Wadsworth, on January 20, 1891, against the appellant, Lorenzo Corey, and the Decatur Building Supply Company.

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The prayer of the bill was to have a pretended sale and transfer, by the Decatur Building Supply Company to the defendant Corey, set aside as fraudulent and void, and that the said Corey be required to account for the value of the assets of the said Building Supply Company, transferred to, appropriated and converted by him. The facts alleged in the bill are set out at length in the opinion.

The respondent Corey demurred to the bill on the following grounds: 1st. That while the bill shows the respondent Corey was a creditor of the said Decatur Building Supply Company, and received the property alleged to have been conveyed to him, in payment and extinguishment of such liability, it does not aver that said property was received at an unfair or unreasonable value. 2d. That it is shown by said bill that the respondent Corey received the property in extinguishment of a debt due him from the Building Supply Company, but it is not shown that the price was inadequate to the value of the property, or that a benefit was reserved to said company. 3d. It is shown that the respondent Corey was a creditor of said company, and although it is averred that the effect of the sale to him was to hinder, delay and defraud the creditors of said company, it is not shown by said bill that the said Corey went beyond the purpose of extinguishing the liability of said company to him. 4th. The said bill seeks to set aside as fraudulent the sale by said company to Corey, and at the same time alleges the conversion by him of certain assets of the company, and seeks an account for the same. 5th. Multifariousness. 6th and 7th. That the bill was vague, uncertain and indefinite.

Upon the submission of the cause, upon this demurrer, the court overruled it; and the decree in this behalf is here assigned as error.

BRICKELL, HARRIS & EYSTER, for appellant. (No brief came into the hands of the reporter.)

E. W. GODBEY, *contra*.—1. Corey's position as director and president imposed upon him the obligations of a trustee to the corporation and its stock-holders. But when the corporation's insolvency supervened, neither the corporation, nor its stockholders (as such) could have any pecuniary interest whatever in its property. The officers then became trustees for the creditors, who were the only class who could honestly have any actual interest in its assets. If an officer holds a debt against the company, he is forbidden

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by all the the laws of trusts, and by every consideration of public policy and sound reason, from preferring himself. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566, 611; Wait on Insolvent Corporations, 507; 2 Morawetz on Corporations, § 787; *Olney v. Conanicut Land Co.*, 18 Atlantic Reporter, 181; 2 Waterman on Corporations, 133, 139; *Drury v. Cross*, 7 Wallace 299; *Howe v. Sandford Fork & Tool Co.*, 44 Fed. Rep. 231; *Lippincott v. Carriage Co.*, 25 Fed. Rep. 577; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7; *Sweeney v. Grape Sugar Co.*, 8 American State Rep. 89; *Richards v. New Hampshire Insurance Co.*, 43 New Hampshire 263; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Beach v. Miller*, 130 Ill. 162; 23 American Law Review, 1011; *Roseboom v. Warner*, 23 N. E. Rep. 339; *Sicardi v. Keystone Oil Co.*, 24 Atlantic Reporter 163.

2. The pretended liability ostensibly extinguished by the sale by the insolvent corporation to its president, Corey, was not, strictly speaking, a contingent one; but when the corporation became hopelessly insolvent, the contingent liability of Corey, as a surety, became, to a great extent, fixed and absolute. A large number of the adjudged cases denying the director's right to a preference arose upon a state of facts similar to the present—the director being only a surety.—*Olney v. Land Co.*, *supra*; *Drury v. Cross*, *supra*; *Howe v. Sandford Fork & Tool Co.*, *supra*; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, *supra*; *Roseboom v. Warner*, *supra*.

3. In addition to being surety of the Supply Company, with respect to the debt it pretended to be owing the bank, and President and a Director of the Supply Company, Corey was also a heavy stockholder, and a director in the creditor bank; and when Corey took the goods in payment of the debt due the bank, he not only secured a preference to himself individually, but also at the same time and by the same act secured a preference and the payment of an otherwise almost worthless debt, with usurious interest, to the fiscal institution, in which he was very largely interested.

4. The bill and exhibits show that all the executive officers of the insolvent corporation, who could have been instrumental in making the sale to Corey, were either co-guarantors with Corey of the pretended debt to the bank, or directors or stockholders in the bank (some had all three of these connections) except Hoy, the General Manager, and he was Corey's brother-in-law; and, therefore, there was no one present interested in seeing that even common

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fairness, within the scope of the transaction, should prevail. It was to the direct pecuniary interest of each officer, that this particular debt should be gotten rid of; it was not to the interest of any one of them, that value should be paid. Every interest there assembled or consulted was in direct hostility to the interests of these general creditors. A sale under such circumstances is in contravention of sound public policy.

5. By this sale, if not otherwise, the corporation was gutted. All the sash, doors, blinds, transoms and shingles were disposed of. Dealing in these articles was the chief business of the corporation. Its chief official could not trust it till the maturity of his debt; but to pay that, not yet due, must strip it of every one of the staples of its stock.

6. If the right of preference be accorded, no outside dealer would extend credit to a corporation, since the very wares he might sell, could and would be used to pay the director, whose debt was kept secret or simulated, to the total exclusion of the general outside creditors.

7. If the right of preference be accorded, corporate disasters will be more frequent. The failure of a corporation entails no liability on directors and does not affect their credit. Failure of a natural person does entail such consequences. Individual profit, at the expense of the corporation, will be the rule.

STONE, C. J.—The present case is an appeal from an interlocutory order of the City Court, sitting in equity, by which Corey's demurrer to Wadsworth's bill was overruled. The case presents a question of very grave importance to the commercial world.

The substantial facts of the case made by the bill are as follows:

At a time anterior to the latter part of the year 1887, "The Decatur Building Supply Company" was incorporated under the general laws of Alabama, Decatur being the place of its business habitation. Wadsworth, the complainant, at various times between the latter part of the year 1887 and May 19, 1888, sold and shipped to the Decatur Building Supply Company lumber and shingles, and, at various dates, drew on the corporation for payment at 90 and 120 days. The several drafts were accepted, but have not been paid. The aggregate sum of the several accepted drafts is fourteen hundred dollars, all of which was long past due when this bill was filed in January, 1891. The bill then

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charges that Lorenzo Corey, one of the defendants, became a stockholder in said Decatur Building Supply Company "in the early part of February, 1888, and thereafter he became a member of the board of directors and president of said company, which position he held at the time of the occurrence of the matters and transactions hereinafter complained of, and has never resigned or been removed therefrom; and that at the time he so became connected with the said Decatur Building Supply Company the same was prosperous and in a solvent condition." The bill then avers that about the fifteenth of May, 1888, the said Corey, together with others, officers and stock-holders of said corporation, entered into an agreement with the Exchange Bank, by which they bound themselves as sureties, or guarantors of said Decatur Building Supply Company, for the payment to the bank of such indebtedness as the Building Supply Co. might incur, not exceeding six thousand dollars. It was then charged that before the end of June, 1888, it was "pretended" that the bank had lent to the Building Supply Company said sum of six thousand dollars, and had taken its notes therefor, due at sixty and ninety days.

The remaining charges of the bill, material to the case in hand, may be summarized as follows: One Hoy, brother-in-law of Corey, was general manager of the Building Supply Co., and was its vice-president. From the 19th to 23d of July, 1888, said company, through Corey and Hoy, sold—"(pretended to make sale of)"—a large part of its stock in trade to Corey, in consideration that he would and did assume to pay and pay the said debt of six thousand dollars to the Exchange Bank, of which Corey and other officers and stockholders of the Building Supply Company had become guarantors. The said debt was presently paid by Corey, and he took possession of the stock in trade so purchased, and removed it to a building of his own. This was done long before the maturity of the debt to the bank, of which Corey and other officers of the Supply Co. were guarantors. The bill then charges, that, "At the time of the aforesaid pretended purchase by Corey of Decatur Building Supply Company, it (the corporation) was hopelessly insolvent, its liabilities due and past due being greater by far than its assets; and within three or four days after the consummation of the transfer to Corey, on to-wit, 26th day of July, 1888, the said Decatur Building Supply Company, acting through said Corey as its president, assigned all its remaining assets to a trustee for the benefit of its general creditors, whose just claims and demands against said com-

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pany, amounted to more than twenty-two thousand dollars; to pay which, property was assigned of value not sufficient to pay more than fifteen per cent." Corey and the Decatur Building Supply Co. are made defendants to the bill.

Before the demurrer was filed to the bill; it was amended, so as to make it a "bill in behalf of complainant and all other creditors of the Building Supply Company, who may come in and make themselves parties complainant hereto, and assume their proportionate share of the costs." Under this amendment, S. Truscott came in by petition, and united in the prayer for relief.

The bill, in a general way, charges that Corey took overpay in the matter of the guaranty for which he with others was bound. It also charges that the money advanced or paid by the bank "was paid, not to the Decatur Building Supply Company, but to the officers making the guaranty of the loan, for their own emolument." These questions need no extended mention here. If the Supply Co. did not get the benefit of the money advanced by the bank, of course it was under no obligation to indemnify the guarantors of the loan; and in taking pay from the Supply Company on that account, Corey misappropriated the assets, and rendered himself liable to the creditors of the insolvent corporation, to the extent of the misappropriation. So, if he overpaid himself for the liability he was under as guarantor to the bank, the same rule will apply to the excess. It is against the policy of the law to permit the president, or any director of a corporation to realize a personal profit, or side speculation, in any dealing he may have with the corporation. 1 Wat. Corp., § 163. These matters, however, are not pressed in argument, and we will not consider them farther.

The question for our consideration, briefly stated, is this: Can a member of the governing body of an insolvent corporation, of which corporation he is a non-secured creditor, be made a preferred creditor in the administration or disposition of the corporate assets; or, must the assets be distributed *pro rata* among all the non-secured creditors? Of course, if valid liens have been created, supervening insolvency can not destroy, or impair them. The question in this case has been industriously and ably argued on both sides.

It is the settled law of this State that a debtor—a natural person—though insolvent, may of his effects, whether money or property, pay one or more creditors in full, although he thereby disables himself to pay his other debts. There are conditions or limitations to this right. The paying debtor

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must not by the transaction secure any benefit to himself, other than the discharge of the obligation he rested under to pay the debt. If paid in property, it must be at its reasonably fair market value. If the property be in value so much in excess of the debt paid with it as to necessitate a substantial payment to the insolvent debtor therefor, and such substantial excess is so paid, this is treated as securing a benefit to the debtor, by enabling him to shuffle such excess out of the reach of his other creditors; and the transaction is fraudulent. If the preference of one or more creditors by an insolvent debtor can withstand these tests, the motive or purpose of the debtor in giving the preference becomes an immaterial inquiry.—3 Brick. Dig. 517, §§ 137-8; *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, 1b. 120; *Shealy v. Edwards*, 78 Ala. 176; *Levy v. Williams*, 79 Ala. 171; *Leinkauff v. Frenkle*, 80 Ala. 136; *Tryon v. Flournoy*, 1b. 321; *Montgomery v. Bayliss*, 96 Ala. 342; *Ellison v. Moses*, 95 Ala. 221; *Tiffany v. Boatman*, 18 Wall. 375; *Grant v. National Bank*, 97 U. S. 80.

There are many authorities which hold that a solvent and going corporation can secure a member of the governing board in the payment of a debt due him; and the fact that the corporation becomes insolvent afterwards, does not impair the validity of his security. We are not inclined to question the correctness of this principle; but we will explain hereafter more fully, what we mean by a solvent corporation.—*O'Connor v. Coosa Furnace Co.*, 95 Ala. 614; *Lexington L. F. & M. Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

There are some authorities which hold that an insolvent corporation may make an assignment, preferring even its own directors, or members of its governing body, if they be creditors of the corporation. That the directors have the same rights as creditors of natural persons have, and that the relation they sustain to the corporation and to its assets, does not impair that right, if in fact their claims be *bona fide* debts of the corporation.—*Whitwell v. Warner*, 20 Vt. 425; *Buell v. Buckingham*, 16 Ia. 284; *Garrett v. Burlington Plow Co.*, 70 Ia. 697; *Planters Bank v. Whittle*, 78 Va. 737; *Burr v. McDonald*, 3 Grat. 215.

The governing body or directory of a corporation holds the capital stock of a corporation in the confidence that it will be preserved and administered, primarily for the benefit of creditors, and secondarily for the benefit of the stock-

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holders.—*Com. Fire Ins. Co. v. Board of Revenue*, ante, p. 1; 14 So. Rep. 490; *Friend v. Powers*, 93 Ala. 114. As long ago as 1824, Justice Story, in *Wood v. Dummer*, 3 Mas. (U. S.) 308, said: "It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank." In *Bank of St. Mary's v. St. John*, 25 Ala. 566-612, this court, in 1854, used this language: "The capital stock of the bank, with all its property and assets, is to be regarded as a trust fund for the payment of creditors; and the stockholders, directors and agents of the bank are trustees for their benefit, and as such may be made to discover and account in chancery." So, in *Bradley v. Farwell*, 1 Holmes, 433, the court said: "The relation between the directors of a corporation and its stockholders is that of trustee and *cestui que trust*." See Wait on Corporations, p. 507, Note 1, and citations; *Elyton Land Co. v. Birmingham Warehouse Co.*, 92 Ala. 407.

In *Smith v. St. Louis Mutual Life Ins. Co.*, 3 Tenn. Ch. Rep. 502, that able chancellor, Cooper, said: "Nor is it denied that our decisions have settled that the assets of an insolvent corporation constitute, under our laws, a trust-fund for the payment of creditors of the corporation, in the order or priority fixed by law, and if there be no priority, then *pro rata*, and that no amount of diligence on the part of one or more of the creditors can defeat the right of others to such distribution. . . . The object is, in certain contingencies, to prevent unseemly scrambles, and to secure, what equity delights in, equality of rights among all who are equally meritorious."

We have cited authorities which affirm the right of a director of an insolvent corporation to have himself made a preferred creditor in a case such as we have in hand. There are authorities the other way. In 2 Morawetz on Corporations, § 787, it is said: "The equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in the fiduciary relation to the company, become placed in a fiduciary relation to its creditors. The powers of management vested in the directors of an insolvent corporation, which has ceased to carry on business, are solely powers to manage the assets in trust for its creditors and for their benefit. It has been held, therefore, that the directors of an insolvent corporation are bound to manage the remaining assets with strict regard for the interests of its creditors. . . . Directors of an insolvent corporation, who have claims

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against the company as creditors, must share ratably with the other creditors in a distribution of the company's assets. They can not secure to themselves any advantage or preference over other creditors, by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and can not be used for their own benefit."

In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263, the head-note expresses the principle decided in the following language: "Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and can not use them to exonerate themselves to the injury of other creditors."

In the case of *Haywood v. The Lincoln Lumber Co.*, 64 Wis. 639, the court decided, that "The directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management, they can not secure to themselves any preference or advantage over other creditors."

In *Sweeney v. Grape Sugar Co.*, 30 West Va. 443, it was held, that "Directors of corporations are trustees for the corporation, and within the rule that one holding a fiduciary relation to trust property can not, either directly or indirectly, become the purchaser of such property, or transfer it to his own use, or for his own benefit, and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may have paid full price and gained no advantage."

In *Beach v. Miller*, 130 Ill. 162, it was said: "The directors of an insolvent corporation are trustees of its assets for its creditors, and can not give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they can not receive any advantage or preference in the payment of their claims at the expense of the other creditors." To the same effect, and by the same court is the case of *Roseboom v. Warner*, 23 N. E. Rep. 339.

In *Olney v. Connecticut Land Co.*, 18 Atl. Rep. (R. I.) 181, it was held, that "The directors of an insolvent corporation are trustees for the creditors of the corporation, and they can not obtain priority over a creditor by taking mortgages to themselves to secure them for advances and for their indorse-

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ment of the notes of the corporation, after the creditor has brought suit, and when the company is insolvent."

In *Howe, Brown & Co. v. Sandford Fork & Tool Co.*, 44 Fed. Rep. 231, it was decided that "Where a corporation, while still a going concern, is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large amount, is invalid as to general creditors, and that though the mortgage was procured by the directors without any actual fraudulent intent."

In *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, the "Directors of an embarrassed corporation, holding claims against it which they wished to protect, had the notes of the company payable to themselves drawn and antedated, and procured them to be discounted by defendant bank. They then caused to be executed a deed of trust conveying all the assets of the company as security for these notes, among others. Held, in a proceeding by unsecured creditors to set it aside, that, being a security for debts upon which the directors were themselves liable as indorsers, it was in effect a preference to themselves, and fraudulent and void."

In Amer. Law Review, Vol. 23, No. 6, p. 1009, there is a strong article maintaining the same doctrine announced in the cases cited above, with a reference to many adjudged cases. See also *Jackson v. Ludeling*, 21 Wal. 616; *Delmey v. Bank of State of South Carolina*, 3 Rich. (S. C.) 124; *Drury v. Cross*, 7 Wal. 299; *Thorington v. Gould*, 59 Ala. 461; *Goodwin v. McGehee*, 15 Ala. 332.

The question we have been considering is one of grave and growing importance in this State, and we have, therefore, felt it our duty to collate the authorities. It will be seen that the modern authorities, almost without exception, utter the same strong condemnatory language of any and all attempts by directors of an insolvent corporation to have themselves indemnified and preferred, over the other creditors of the company. The assets are, in a sense, a trust fund in their hands for the payment of the corporation's debts, and it is both their moral and legal duty to maintain perfect equality in their administration and disbursement; at least to the extent that they can not prefer themselves. We need go no farther in this case.

In looking into the authorities, it will be seen that the right of the directors of an insolvent corporation to prefer themselves as creditors, is withheld from them, not alone on the ground that the assets are a trust fund, of which they are trustees for the creditors. Notice is taken of the superior

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knowledge they necessarily have, and the great advantage this would, and does give them in a race of diligence. But the principle extends farther. In a conveyance by which they attempt to pay or secure themselves, that necessary element of all valid contracts—opposing interest in the seller and buyer—is wanting. They are both seller and buyer. Such transactions by a trustee are always voidable, on the ground of public policy.

At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principle we have declared? It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so. In other words, if it be, in good faith, what is sometimes called a *going* business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent.

Under the definition we have given, we hold that the sale, charged in the bill to have been made by the Decatur Building Supply Company to Corey, was, if the averments be true, an attempted preference by an insolvent corporation of a member of its governing board, and that he is chargeable as a trustee with the property and effects so received, or their value, for the equal benefit of all the creditors.

The question we have been considering may possibly have been remotely touched in the case of *Globe Iron R. & C. Co. v. Thatcher*, 87 Ala. 458; 6 So. Rep. 366. To the extent of the conflict, if there be such, the present opinion must prevail.

The decretal order of the chancellor, overruling the demurrer to the bill, must be affirmed.

MCCLELLAN, J. dissenting.

[Jefferson County Savings Bank v. McDermott et al.]

Jefferson County Savings Bank v. McDermott et al.

Motion to Amend Return of Sheriff.

1. *Officer's liability for false return.*—If an officer's return is impeached, and the attack is sustained, he is liable in damages to the party who may have been injured by such false return.

2. *Sheriff a necessary party.*—On a motion to amend a sheriff's return, so as to show a different date of service from that certified, the sheriff is a necessary party.

3. *Priority of lien by service of process.*—When process, in an action by creditors to set aside as fraudulent a sale of a stock of goods, is served prior to the levy of defendant's attachment, the attachment lien is subordinate to the lien of the process.

APPEAL from City Court of Birmingham, sitting in equity.

Heard before the Hon. H. A. SHARPE.

The bill in this case was filed by the appellees against B. F. Eborn and the Jefferson County Savings Bank; and sought to set aside, as fraudulent, a sale of a stock of goods. It was averred in said bill that the defendant Eborn, after borrowing money of the Jefferson County Savings Bank, gave a bill of sale as security, but was left in possession and permitted to sell at retail and dispose of the proceeds; that on September 15, 1886, said defendant, B. F. Eborn, sold or attempted to sell to his mother, Mrs. Bettie Eborn, the greater portion of his goods, and that on the same day the defendant, the Jefferson County Savings Bank, caused to be issued a writ of detinue under which the sheriff took possession of said goods attempted to be sold to Mrs. Eborn, and all the other goods belonging to the defendant B. F. Eborn; and that on September 22, 1886, the Jefferson County Savings Bank dismissed their detinue suit, and attached said goods. The original bill in the present case was filed on September 15, 1886; and the return of the sheriff shows that the service of process in the present suit was executed on the Jefferson County Savings Bank and B. F. Eborn on September 15, 1886. The complainants became creditors of Eborn subsequent to the execution of said bill of sale to the Jefferson County Savings Bank, as first made on May 30th, 1886; and the City Court of Birmingham rendered a decree dismissing complainant's bill on the ground that said bill of sale was not void as to subsequent creditors. On

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appeal to this court, it was held that said bill was void as to subsequent as well as existing creditors; and the decree of the Chancery Court was reversed, and the cause remanded. It was shown on said appeal that there was a motion on the docket of the lower court, at the time the appeal was taken, to amend the sheriff's return, so as to show the service of process on the defendant was after the levy of the Jefferson County Savings Bank's writ of attachment on said goods, which motion was not acted upon by the lower court. The Supreme Court, in reversing the cause, said: "That the motion having been made to have the return of the sheriff amended so as to show the priority of the levy of the attachment, and this motion not having been acted upon, we reverse the decree and remand the cause, in order that some action may be taken on it." After this reversal, the cause coming up again to be heard in the City Court of Birmingham, the Jefferson County Savings Bank filed an answer in the nature of a cross-bill, to have the sheriff's return amended so as to show the priority of the lien of the defendant's attachment, and it also filed motions to so amend the sheriff's return. The complainants filed a motion to dismiss the cross-bill, and demurred thereto, and also to the motion to amend the sheriff's return. The grounds of these demurrers were substantially as follows:

1st. The proper remedy for defendant is an action against the sheriff and his sureties. 2d. A party to the suit has no right to ask the court to amend the sheriff's return; but if the return is false, the sheriff can ask leave of the court to amend it. 3d. Neither the motion nor cross-bill seeks to cause the sheriff to amend his return, but asks the court to amend it. 4th. Because the sheriff is not made a party to the proceedings which seek to have his return amended. 5th. Because the motion and cross-bill both show that the sheriff was dead at the time of said motion, and the effort to amend his return is made too late.

The complainants' demurrers were sustained. The cause then being submitted on the pleadings and proof, a decree was rendered in favor of the complainants. Defendants prosecute this appeal, and assign as error the various rulings of the lower court.

W. C. WARD, and E. K. CAMPBELL, for appellant.

MOUNTJOY & TOMLINSON, *contra*.

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WALKER, J.—When this case was here on a former appeal, it was decided that the bill of sale to the Jefferson County Savings Bank was fraudulent and void as against the complainants, and that if the process in this suit was served on the defendants prior to the levy of the attachment sued out by the bank against Eborn, then the lien of the complainants would be superior to that of the bank. No disposition having been made by the trial court of the motion which had been made for the amendment of the sheriff's return of the process in this case, so as to show a priority in the levy of the attachment, the cause was remanded, in order that some action might be taken on that motion.—*McDermott v. Eborn*, 90 Ala. 258. After the remandment of the cause, the defendant bank amended its motion to set aside and correct the sheriff's return on the process in this case, and alleged in the amended motion that the sheriff, whose return was sought to be corrected, was then dead. The same relief as to the correction of the return indorsed on the process was also sought by a cross bill interposed by the bank. The complainants' demurrers to the amended motion and to the cross-bill were sustained. That action of the trial court is now assigned as error.

The practice in the courts of this State of granting leave to a sheriff to amend his return of process, so that it may conform to the facts, is well established and is approved.—*Wilson v. Strobach*, 59 Ala. 488; *Daniels v. Hamilton*, 52 Ala. 105; 3 Brick. Dig., 745; 2 *Ib.*, 456. A different question is presented when it is sought to compel the sheriff to change his return as to a matter of fact, or to have the court to substitute its finding as to the facts of the service of process in the place of the officer's return. When the officer does not consent to the proposed correction, and the application is contested, a separate issue is presented for trial. It seems that the courts have regarded it as a matter of necessity to give credence to the official return of the service of process, in order to avoid the embarrassments of turning aside to try such collateral issues; and that a party who has been injured by a false return can not dispute it in that case, but must seek redress by proceedings against the officer.—*Brown v. Turner*, 11 Ala. 752; *Crafts v. Dexter*, 8 Ala. 767; *Martin v. Barney*, 20 Ala. 369; *Boas v. Updegrove*, 5 Pa. St. 516, s. c.; 4 Am. Dec. 425; *Vastine v. Fury*, 2 Serg. & Raw. 426; *Bolles v. Bowen*, 45 N. H. 124; 2 Freeman on Executions, §§ 358–369; Murphree on Sheriffs, § 868. It is not necessary to determine whether or not such absolutely conclusive effect must always be accorded to a sheriff's return in the

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case in which it is made ; for, without deciding that question, the action of the City Court in refusing to disturb the return in this case may be sustained. By whatever procedure a return is impeached, if the attack against it is sustained, the result is to render the officer who made it liable in damages to the party who may have suffered injury in consequence of its falsity. In the present case, for instance, if it is a fact that the process was not served on the defendants until after the service of the writ of attachment sued out by the bank, the sheriff would be liable to the bank for any injury resulting to it from the falsity of the return ; and, if the correction is made in this case, he might also be liable to the complainants for the failure to serve their process with proper diligence. The issue presented was one in which the sheriff was materially interested. He was a necessary party to any proceeding for the determination of the question. He was dead when the amended motion and the cross-bill were filed and submitted. His representative was not brought into the case. The controversy sought to be presented could not have been settled because of the absence of an indispensable party. The grounds of demurrer addressed to this defect in the amended motion and in the cross-bill should have been sustained.—*Brooks v. Harrison*, 2 Ala. 209 ; 3 Brick. Dig., p. 368. If the sheriff, or his personal representative, could not have been made a party to the proceedings for the purpose of trying the question of the truth or falsity of the return, then that consideration alone would support the conclusion, that the issue is one not determinable in this cause ; for that can not be a proper method of procedure from which must be omitted a necessary party to the question to be settled. It is unnecessary to determine whether or not the personal representative of the sheriff could have been made a party to the proceeding so as to be bound by the result thereof. The fact in this case that a necessary party was not before the court suffices to support the ruling on the demurrers pointing out that defect.

The contention of the complainants was that they were entitled to have the debts due to them from Eborn paid out of property which, it was alleged, was claimed by the bank. The bank at first claimed that property under the bill of sale, and, afterwards, claimed a prior lien by virtue of its writ of attachment. The former claim has been disallowed as fraudulent. The latter claim is subordinate to the lien in favor of the complainants, for, according to the sheriff's return which has not been amended or set aside, the at-

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tachment was not sued out until after the process in this case was served on the defendants. But it appears from the answer of the bank to the bill as amended that the property in question has been sold under its writ of attachment, and that it has received, as proceeds of the sale, an amount greater than the aggregate of the complainants' claims. There being in this case no claimant to that property, or the proceeds of its sale, besides the complainants and the bank, and it having been clearly ascertained that the complainants were entitled to priority, and that the bank was chargeable with more than enough to satisfy their debts, there was no necessity of a reference to the register to state an account of the amount with which the bank was chargeable, or to calculate the interest on the complainants' demands. The bank admitted that its receipts from the sale amounted to more than the complainants' demands. No further inquiry on this subject was necessary. The simple computation of interest was properly made by the judge himself without a reference.—3 Brick. Dig., p. 396, § 476, *et seq.*

The other questions sought to be raised by the assignment of errors are concluded by the decision on the former appeal. We have discovered no reason to disturb that determination.

Affirmed.

Kennedy v. Smith.

Motion for Summary Judgment Against a Sheriff and Sureties on Official Bond.

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143	474

1. *Exemptions; the definition of personal property as used.*—The words "personal property," as used in the exemption laws, have a comprehensive signification, and as construed, embrace everything which is the subject of ownership, not realty or an interest in realty.

2. *Same; a debt subject thereto.*—A debt due the defendant in execution, is personal property within the meaning of the statute (Code, § 2511), and subject to a claim of exemption, to the amount allowed by statute; and that such a debt was secured by lien on other personal property, of greater value than \$1,000, does not affect the claimant's right to claim said debt as exempt.

3. *Same; not increased by claim under a lien to property to secure a debt.*—Where personal property is levied on as the property of a defendant in execution, who files a claim of exemptions to a debt of \$1,000, the fact that he claims, in addition to said debt, whatever

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right he had in the property levied on to secure the debt, adds nothing to the amount claimed as exempt; since, in no way, could the defendant, under his lien, derive from the property more than the \$1,000.

4. *Prima facie liability of sheriff for the discharge of a levy.*—The fact that property was levied on under an execution as the property of the defendant, imposes a *prima facie* liability on the sheriff to the plaintiff, for the value of the property, not to exceed the injury plaintiff might sustain from the discharge of the levy; but in the absence of other proof, the statement in the exemption claim, which was offered in evidence by the plaintiff, that the only claim the defendant had to the property levied upon was a lien to secure the debt, overcomes the *prima facie* liability of the sheriff.

5. *Burden of proof on plaintiff to show that defendant had other property in the County.*—If the defendant in execution has a leviable interest in any other property in the county than that levied upon, the burden is upon the plaintiff to prove such fact, and that the sheriff could, with due diligence, have made the money due on the execution by a levy on such property.

6. *Lien on personal property not subject to levy and sale under execution.*—A mere lien on property, in favor of the defendant in execution, is not subject to levy and sale under such execution, since a lien is not "personal property of the defendant," within the meaning of the statute. (Code, § 2892)

7. *Burden of proof on sheriff to show property not subject to execution.* In a proceeding against the sheriff for a failure to collect money under an execution, where the sheriff has been indemnified, he assumes, by failing to sell, the burden of showing that the property was not subject to levy and sale under the execution.

8. *Failure of plaintiff to file a contest of exemption; duty of sheriff to discharge the levy.*—When a claim of exemption has been filed with the sheriff to property levied on under execution, and due notice thereof given to the attorney or plaintiff in execution, and the latter fails to file a contest within the time prescribed by law, the right of the sheriff to sell under the execution ceases, notwithstanding the indemnity, and it becomes mandatory upon the sheriff under the terms of the statute, (Code, § 2521), to discharge the levy.

9. *The right of sheriff to disregard a claim of exemption.*—A sheriff has no power to pass on the sufficiency of a claim of exemption, and can disregard no claim, unless interposed by the defendant in an execution on a judgment based on a tort, or other demand against which the statute does not authorize a claim of exemption to be interposed.

10. *Inadmissible evidence.*—A letter written by an attorney for the plaintiff in execution, forbidding the release of property from the levy of execution, can have no effect upon the duty of the sheriff, and is inadmissible in evidence.

11. *The signature of presiding judge to charges given and refused.* The statute, (Code, § 2756), does not require the presiding judge to sign his name in full, in marking a charge "Given" or "Refused;" or to add his title to his name in such cases.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The facts of the case are sufficiently stated in the opinion.

[Kennedy v. Smith.]

RICHARDSON & REESE, for appellant.—The claim of exemption was defective, and the sheriff should have regarded it as a nullity and sold the property thereunder.—Code of 1886, §§ 2526, 2533; *Myers v. Conway*, 90 Ala. 109; *Tonsmere v. Buckland*, 88 Ala. 312; *Ex parte Redd*, 73 Ala. 548; *Ex parte Barnes*, 84 Ala. 540.

TOMPKINS & TROY, and JOHN A. ELMORE, *contra*, cited *Daniels v. Hamilton*, 52 Ala. 105; *Block v. Bragg*, 68 Ala. 291; *Alley v. Daniel*, 75 Ala. 403; *Ex parte Haralson*, 75 Ala. 543; *Abbott v. Gillespy*, 75 Ala. 180; Code of Alabama, §§ 2522–2523.

THORINGTON, J.—This is a summary proceeding under the statute, instituted by appellant against appellee, and the sureties on his official bond, as sheriff of Jefferson county; the grounds of the motion being that appellee, Smith, as such sheriff, failed to make the money on an execution in his hands in favor of appellant against one W. M. Nalls, which by due diligence he could have made.

Appellant's attorneys, on placing the execution in the hands of the sheriff, required him to levy the same on certain machinery in Jefferson county as the property of said Nalls. The property being claimed by a third party, the sheriff demanded indemnity from appellant, the plaintiff in the execution, which being given, the levy was duly made. Within the time required by the statute the defendant in execution, W. M. Nalls, filed a claim of exemption with the sheriff, in which he claimed as exempt a debt of one thousand dollars due him by the firm of Nalls & Baker (of which defendant was not a member), secured by lien on the machinery levied on under the execution. The exemption claim described the machinery specifically, giving the value of each separate item, and claimed as exempt whatever interest the defendant in execution had in said property as security for his said debt of one thousand dollars, which claim was duly verified by defendant's affidavit and lodged with the officer before a sale of the property. Of the filing of this exemption claim the attorney of the execution creditor was duly notified.

At the time of the levy the sheriff also had in his hands an execution against the same defendant in favor of another judgment creditor, which was levied on the same property, after the levy under the execution first above mentioned, and both executions were controlled by the same attorney and levied under his directions. A contest of the exemption

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claim was duly filed by the attorney for the plaintiff in the second execution, but no contest was filed in the case in which appellant is the plaintiff in execution. After the lapse of ten days from the date of the levy under appellant's execution, the sheriff released the levy, and delivered the property levied on to the defendant in execution. In his return to the City Court of Montgomery, whence the execution issued, it is stated that a contest was filed in that case, and that neither defendant nor plaintiff having given bond, as they were severally authorized by the statute to do, the levy was discharged by the sheriff, and the property delivered to defendant in execution; but the bill of exceptions shows that no affidavit of contest was in fact filed in this case.

Appellant's attorneys, before the levy was so discharged by the sheriff, wrote a letter to such sheriff insisting that the claim of exemption was informal and void, and notifying him not to discharge the levy, also informing him of the pendency of certain chancery proceedings, to which the sheriff had been made a party, and in which a restraining order was sought to prevent him from selling the property, and which proceedings, the writer of the letter claimed, created a lien on the property, and imposed on the sheriff the duty of holding the property subject to the Chancery Court's decree. This letter is shown to have been duly mailed, post-paid; but the sheriff testified that he has no recollection of having received or heard of it. It appears from the date to have been mailed at Montgomery to the sheriff at Birmingham on the same day the levy was released. Appellant's counsel notified appellee to produce the original letter at the trial in this case, and on the failure of appellee so to do, appellant's counsel offered in evidence a letter-press-copy thereof, to the introduction of which appellees objected, and the objection being sustained by the court, appellant reserved an exception.

It was shown by appellees that the sheriff endeavored to find other property of defendant in his county, but was unable to do so.

Appellant, on the trial, insisted that the claim of exemption was void, and that the sheriff should have disregarded it, and also that the value of the machinery being shown to exceed the amount of the debt claimed as exempt, the sheriff should have sold for such excess; and the charges asked in his favor and refused by the court are based on that contention. The court, at the request of appellees, gave the general charge in their favor.

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It has often been decided by this court, that the exemption laws, being founded in a spirit of humanity, are to be liberally construed, and that the words "personal property," as used in such laws, have a comprehensive signification, and that they embrace everything which is the subject of ownership, not being realty or an interest in realty.—*Enzor & McNeil v. Hurt*, 76 Ala. 595. The debt due to the defendant in execution from Nalls & Baker for one thousand dollars was personal property within the meaning of section 2511 of the Code, and subject to the defendant's claim of exemption. That this debt was secured by a lien on personal property worth more than one thousand dollars did not affect the defendant's right to claim it as exempt. The lien itself is neither a *jus ad rem* nor a *jus in re*. It is neither a right of property in the thing, nor a right of action for the thing. It necessarily supposes the property to be in some other person, and not in him who sets up the right to the lien. The fact, therefore, that the defendant in the execution claimed, in addition to the debt of one thousand dollars, whatever right he had in the property to secure it, did not increase the amount claimed as exempt beyond the statutory limit of one thousand dollars. It added nothing whatever to the amount of the exemption claimed. Whatever the value of the property on which the lien existed may have been, the defendant could not, under his lien, have derived from the property more than the one thousand dollars. Had an excess over and above the debt been realized from the security, such excess would have been the property of Nalls & Baker, and not of W. M. Nalls, the defendant in execution.

We discover nothing in the testimony or record to support the contention of appellant's counsel, that the machinery levied on belonged to W. M. Nalls, the defendant in the execution. The mere fact that it was levied on under the execution as his property may have imposed a *prima facie* liability on the sheriff to the plaintiff in execution for the value of the property, not exceeding the injury the plaintiff might sustain from a discharge of the levy, but in the absence of other proof, we must accept the statement in the exemption claim, which was offered in evidence by appellant himself, that the only claim W. M. Nalls had upon the machinery was as security for his one thousand dollar debt, and this statement overcomes the *prima facie* liability of the sheriff above mentioned. If the defendant in the execution had any leviable interest in any other property in appellees' county, the burden was upon appellant to prove

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such fact, and that appellee Smith, as such sheriff, could, with due diligence, have made the money due on the execution.

The mere lien on the property in favor of the defendant in execution was not subject to levy and sale under execution, it not being "personal property of the defendant" within the meaning of the statute.—(Code, § 2892.)

The discharge of the levy by the sheriff did not, therefore, work any harm or injury to the plaintiff in the execution. But, inasmuch as the sheriff had been indemnified by the plaintiff in execution, and who demanded the sale of the property under the execution, the sheriff, by failing to sell, assumed the burden of showing that the property was not subject to the execution, and this it was competent for him to do by showing that some legal restraint was imposed upon the sheriff against the making of such sale.—*Mathis v. Carpenter*, 95 Ala. 156; 10 So. Rep. 341. As we have seen, the lien of the defendant in execution upon the property levied on was not subject to levy and sale, but it was property capable of being claimed as exempt within the enlarged meaning of the exemption statute (Code, § 2511), that section having been construed by this court as embracing "everything which is the subject of ownership, not being realty or an interest in realty," and the claim of exemption filed by the defendant in execution with the sheriff was rightfully interposed and embraced such interest or lien as an incident to the debt it was given to secure. A specification of this lien in the claim of exemption was not a claim of exemption to separate property in addition to the debt, but to that which was a part of the debt itself, or that from which the debt was to be realized.

Upon the filing of this claim of exemption with the sheriff and due notice thereof given to the attorney or the plaintiff in execution, and the failure of the latter to file a contest of the exemption claim within the time prescribed by law, the right and duty of the sheriff to sell under the execution ceased, notwithstanding the indemnity, and it became mandatory upon him by the terms of the statute (Code, § 2521,) to discharge the levy, and deliver the property to the defendant in execution, from whose possession it appears from the testimony it was taken when the levy was made.

In such case the sheriff has no discretion to disregard the claim of exemptions. The law does not invest him with judicial powers which authorize him to determine the legal sufficiency of the claim of exemption; that is to be done upon a contest instituted pursuant to the statute, and where,

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if the claim is insufficient, it may be amended, and a trial of its validity obtained.—*Block v. Bragg*, 68 Ala. 291; *Abbott v. Gillespy*, 75 Ala. 180. The only case in which the sheriff can disregard a claim of exemption, however informal or irregular, interposed by a defendant in execution within the time prescribed by the statute, is where the execution is issued upon a judgment based upon tort, or other demand against which the statute does not authorize a claim of exemption to be interposed. It has been held by this court, that where it appears from the face of the papers the case is one not governed by the exemption laws, it is the duty of the sheriff to disregard the claim of exemption, and to proceed with the sale of the property. All the authorities cited by appellant's counsel on this point come within this class, and consequently have no application to the case at bar.

The letter written to the sheriff by the attorneys for the plaintiff in execution, forbidding the release of the property from the levy, could have no effect upon the duty of the sheriff in the premises. The law points out the mode by which the plaintiff in execution could have preserved the levy after the filing of the exemption claim and notice thereof to the plaintiff or his attorney, and that is by the contest of such claim duly instituted pursuant to the statute. This mode is exclusive, and the letter by which plaintiff's attorneys sought to accomplish that purpose, being wholly ineffectual, there was no error in the refusal of the court to permit its introduction in evidence.—*Block v. Bragg*, *supra*.

Without considering specifically the other exceptions, which arise upon the instructions given or refused by the court, it is only necessary to add, the proof fails to show that the defendant in execution had any property in Jefferson county from which appellee Smith, as sheriff of such county, could by due diligence have made the money due on appellant's execution, and for that reason the general charge was properly given at the request of appellee.—3 Brick. Dig. p. 405, § 22.

There is nothing of which appellant can complain in this court in the failure of the presiding judge to sign his name in full upon the charges marked by him "Given" or "Refused." It does not appear that the exception on this ground was taken before the jury retired, when the omission might have been supplied, and it does not appear that any injury resulted therefrom to appellant. Mere error without injury will not work a reversal in this court. Furthermore, the exception is "to the action of the court in not writing out his name and attaching thereto the title, Judge," while the statute

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only requires the presiding judge in marking a charge "Given" or "Refused" to sign his *name* thereto. There is no requirement that he shall add his *title*. The exception, therefore, is too broad, and can not avail.—Code of 1886, § 2756.

The judgment of the City Court must be affirmed.

Root v. Johnson.

Bill in Equity by Purchaser, for Specific Performance of Executory Contract for Sale of Land.

99	90
102	100
99	90
126	589
99	90
d144	479
144	480

1. *Partial payments, with interest.*—Where the contract of purchase provides that the purchaser shall pay "fifteen dollars cash, and balance with interest from date in quarterly instalments of 10 dollars each," the quarterly payments so required are ten dollars net, including interest accrued at date of payment, to be continued until the entire purchase-money, with interest, is paid.

2. *Forfeitures of contract; specific performance.*—Forfeitures not being favored in equity, relief by specific performance will be granted when the court can give by way of compensation all that could be justly demanded, unless the penalty is fairly proportionate to the damage suffered by the breach.

3. *When actual tender unnecessary.*—When, before tender made, the party to whom money is due declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money if tendered, actual tender is dispensed with.

4. *Same.*—In such case, tender in bill for the specific performance of a contract of sale is sufficient.

APPEAL from City Court of Montgomery, sitting in equity.
Heard before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed on July 19, 1888, by the appellee, J. W. Johnson, against the appellant Isaiah E. Root; and sought to have enforced the specific performance of a contract for the purchase of a certain lot, and also to enjoin the prosecution of an action of ejectment, which had been instituted by the respondent against the complainant to recover the possession of said lot. The agreement of sale, which was in writing, and attached as an exhibit to the bill of complaint, was in words and figures as follows: "Received April 19, '86 of J. W. Johnson fifteen dollars on a/c. of a half acre lot in Neil tract, next south of Elsie Tarver, and extending to west line of tract, or at right angle to the same, which I agree to sell to him for 100 dollars, payable

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fifteen dollars cash, and balance with interest from date in quarterly instalments of 10 dollars each, with the condition that if any payment agreed to be made is not made in a year from date agreed to be paid, all payments previous shall be forfeited to me for use of land, and I shall have the right to re-enter and take possession of the land, and this obligation shall be null and void. [Signed] Isaiah E. Root."

The complainant averred in the bill his willingness and readiness to pay, and offered to pay such amount of the purchase-money as might be ascertained to be due. Such other facts as are necessary to a full understanding of the opinion are stated therein.

On the final hearing of the case, on the pleadings and proof, the chancellor granted the relief prayed for in the bill of complaint, and ordered a reference to the register to ascertain the amount of the purchase-money still due the respondent. This decree is here assigned as error by the respondent, who brings the present appeal.

A. A. WILEY, and W. S. THORINGTON,* for the appellant.

JAS. T. HOLTZCLAW, *contra*.

STONE, C. J.—The bill in this case was filed July 19, 1888. Its object is to enforce specific performance of an executory agreement, whereby Johnson purchased from Root a half-acre lot of ground lying near the city of Montgomery. The written agreement evidencing the sale, as set out in the reporter's statement of facts, bears date April 19, 1886, and was signed by Root, the seller. The price agreed on was \$100; \$15 agreed to be paid, and actually paid at the date of the contract, and the balance to be paid in quarterly instalments of \$10, until the whole purchase-money, with interest, should be paid.

It is contended for appellant that the \$10 instalments of the purchase-money, agreed to be paid quarterly, were to be supplemented, at each payment, with the then accrued interest on the entire unpaid balance of the purchase-money. This would increase the first payment—July 19, 1886—by three months interest on \$85, and require the addition of that interest—\$1.70—to the ten dollars then demandable. And it is claimed this was and is the proper rule, until the entire purchase-money should be paid. This is not our interpretation of the contract. Its language is, "fifteen dollars cash, and balance with interest from date in quarterly instalments of 10 dollars." The "interest from

* This case was decided before W. S. Thorington was appointed Judge.

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date" refers to, and qualifies the "balance" of the purchase-money, and not the "10 dollars" instalments. We hold that the quarterly payments required under the contract were ten dollars net, and to continue until the purchase-money, with interest, should be paid in full. Under this interpretation, \$10 were due at the end of every three months; the first to mature being July 19, 1886.

The written agreement of sale contains "the condition, that if any payment agreed to be made is not made in a year from date agreed to be paid, all payments previous shall be forfeited to me for use of land, and I shall have the right to re-enter and take possession of the land." Forfeitures are not favorites in equity, and unless the penalty is fairly proportionate to the damage suffered by the breach, relief will be granted when the court can give by way of compensation all that could be reasonably expected. 8 Amer. & Eng. Encyc. of Law, 449.

Johnson, the purchaser, paid \$20 in December, 1886. This is admitted by Root. This paid the installments maturing in July and October of 1886, although not on the days they were demandable. It is also admitted that he paid \$10 in August, 1887. This was in less than a year after the maturity of the instalment of January 19, 1887. The next instalment to mature would be April 19, 1887, and if a year after that was permitted to elapse without payment or tender of that instalment, then, according to the letter of the contract, Johnson forfeited his purchase. Johnson testified that he tendered to Root \$10 January 1, 1888, and that Root refused to receive it, claiming that the contract was forfeited. Meriwether testified that he heard Root admit such tender was made. Root denied that any tender was made; but his testimony, and that of other witnesses tends to show he claimed a forfeiture long before the letter of the contract, under our interpretation, authorized such claim. The witnesses McDonald and Loveless tend to strengthen Johnson's version, and to weaken that given by Root. The judge of the City Court, chancellor in this cause, reached the conclusion that the \$10 were tendered to Root January 1, 1888, and the testimony does not convince us that he erred. This tender, as we have shown, was in time to prevent a forfeiture, under the most technical enforcement of the contract.

The law does not exact the observance of a vain ceremony. The purpose of tender, in a case like the present, is to leave the seller without excuse for a non-compliance with his contract, and to cast on him the fault of its breach. When, before tender made, the party to whom money is due

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declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money if tendered, then actual tender is dispensed with.—7 Wait's Act. & Def. 593. It was sufficient, in this case, to tender payment in the bill. This renders it unnecessary that we should pass on the weight or credibility of the conflicting testimony, bearing on the question of the alleged tender made by Johnson of the whole amount due, before instituting this suit.

Affirmed.

Merriman & Co. v. Knox.

Action on Promissory Note for Commercial Fertilizer.

1. *Note given on sale of commercial fertilizer; failure to comply with statute.*—In an action on a promissory note given for the price of a quantity of commercial fertilizer bought by the defendant, a plea averring that the sale was made in Alabama, and that the tags were not affixed to the bags when delivered, and that the sellers had not taken out a license, as required by law, (Code, §§ 140-141), is a full defense to the action.

2. *Same; not affected by the non-residence of seller.*—Before a valid sale of commercial fertilizer can be made in this State, the seller must be licensed, and the fertilizer tagged, as required by the statute (Code, §§ 139-141); and this is true whether the seller is a resident or non-resident, and whether the fertilizer was manufactured in this State or elsewhere.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellants, Merriman & Co., against the appellee, C. J. Knox; and counted upon a promissory note, made by the defendant to the plaintiffs. The defendant pleaded two special pleas to the complaint. In the first, it was averred that the only consideration for the promissory note, the foundation of the suit, was a quantity of fertilizer sold by the plaintiffs to the defendant; that the contract of sale was made in Troy, Alabama, by the defendant with one of the plaintiffs, the note executed in Troy, and the fertilizer was to be delivered there; and that when the contract of sale was made, the fertilizer was not tagged by the plaintiffs, or any one for them, as required by section 141 of the Code of 1886, nor were the bags or sacks tagged at the time of delivery to the defendant. In the

99	93
104	654
99	93
107	466
99	93
113	207

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second plea, after alleging the sale, &c., it was averred that at the time of sale the plaintiffs were not licensed as required by section 140 of the Code of 1886. To these pleas the plaintiffs filed their replication, alleging that they were citizens of Maryland, and the goods sold, for which the note was executed, were manufactured in the State of Maryland, and shipped from the city of Baltimore in the said State. To this replication the defendant demurred on the ground that it was no answer to either of said pleas; and that it failed to negative either of the averments of said pleas.

The court sustained the defendants demurrer to the replication; and upon issue being joined, a verdict was found in favor of the defendant, and judgment rendered accordingly. The plaintiffs prosecute the present appeal, and assign as error the rulings of the trial court in sustaining the demurrer to their replication.

GARDNER & WILEY, for appellants.

KNOX & GAMBLE, *contra*.

WALKER, J.—A sale in this State of commercial fertilizer is void, if the person making the sale has not been licensed as required by the statute, or if the fertilizer is not tagged as required by the statute.—Code, §§ 139 to 141. The former decisions of this court have settled the propositions, that the statute in question is a legitimate police regulation, and that it is a good defense to a note given for the agreed price of a quantity of commercial fertilizer bought by the defendant, that the sale was made in Alabama by a person not licensed as the statute requires, or that tags were not affixed to the bags or packages when delivered, as by law required. *Steiner v. Ray*, 84 Ala. 93; *Johnson v. Hanover National Bank*, 88 Ala. 271; *Campbell v. Segars*, 81 Ala. 259. If the sale is made in this State it makes no difference whether the seller is a resident of the State or a non-resident, or whether the fertilizer sold was manufactured in this State or elsewhere. The statute makes no discrimination against the residents or products of other States. No exemption from obedience to such a police regulation is allowed to non-residents, or to the products of other States which are sold in Alabama. The replication of the plaintiffs to the defendant's plea, in stating that they were citizens of the State of Maryland, and the goods sold were manufactured in that State and shipped from the city of Baltimore, but not denying that the sale was

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made in this State, or that there was a failure to comply with the requirements of the statute, disclosed no valid objection to the defenses set up by the pleas. There was no error in sustaining the demurrer to the replication.

Affirmed.

Lee v. Thompson.

99	95
108	284

Statutory Action of Ejectment.

1. *Possession of land under parol gift; when adverse.*—The possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and if continued without interruption for ten years, is protected by the statute of limitations, and matures into a good title.

2. *Adverse possession; recognition of donor's title.*—In order to defeat a title to land acquired by adverse possession under a parol gift, by evidence that there was a recognition by the donee of the donor's title, it must be shown that such recognition occurred before the expiration of the period necessary to perfect the donee's title by adverse possession.

3. *Same; effect of a sale of lands under a decree.*—A defendant, claiming title by adverse possession, is concluded from setting up such title, when the lands sued for were sold as a part of her donor's estate, under a decree of the Chancery Court in a cause to which she was a party, and at which sale the land was purchased by the plaintiff.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. J. M. CARMICHAEL.

This was a statutory action in the nature of ejectment, brought by the appellant, Annie T. Lee, against the appellee, Jane Thompson; and sought to recover the possession of a certain tract of land specifically described in the complaint. The action was commenced on October 29, 1889. The title of the plaintiff, as is shown by the bill of exceptions, was rested upon a deed made by the register of the Chancery Court of Barbour county to the plaintiff, Annie T. Lee. This deed was executed on May 8, 1889, and recited that it was made in obedience to a decree of the Chancery Court. Plaintiff introduced in evidence the records of the Chancery Court of Barbour county, which showed that after the death of Francis John, the father of the defendant in the present suit, his heirs at law brought suit in the Chancery Court against his wife, Nancy John, for the land which had been acquired by said Francis John after marriage with said

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Nancy John, which included the land now sued for in this case. It was further shown by said records that Nancy John, the widow of said Francis John, answered the bill of complaint, and that upon her death the said suit was revived against her personal representative and against her heirs, the present defendant, Jane Thompson, being one of the latter; that a compromise was effected between the parties complainant and defendant to this chancery suit, and a decree was rendered for a sale of all the land acquired by Francis John after his marriage with the said Nancy John, and this decree included the lands now involved in this controversy. Jane Thompson, the present defendant, was a party to the compromise, and the lands were decreed to be sold for the purpose of division, in accordance with the terms of said compromise. It was also shown by the said chancery record that the administrator of the estate of Nancy John, deceased, advertised the sale of lands, including those here sued for, under said decree of the Chancery Court, and that at said sale the present plaintiff, Annie T. Lee, purchased all of said lands; that said sale was reported to, and confirmed by the Chancery Court, and that upon the report of the administrator that all of the purchase-money had been paid, the register was directed to make a deed to the purchaser, the said Annie T. Lee, which was done; and it is under this deed, executed on May 8, 1889, by the register in chancery, that the plaintiff bases her right to the lands now sued for.

The defendant's claim to the property in controversy was based upon her adverse possession since the year 1864, at which time she went into possession of said lands under a parol gift from her father. The facts relative to this claim of the defendant are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the plaintiff requested the court to give the following written charges: (1.) "If the defendant acquired her right by parol gift from John, her right, whatever it was, did not become adverse until she asserted it by a positive and continuous disclaimer and disavowal of the title of John, and by the assertion of a title hostile to him brought home to his knowledge. And her possession and assertion and disavowal of this character must have been continuous for the period of ten years." To the court's refusal to give said charge the plaintiff duly excepted; and she also separately excepted to the giving of each of the following written charges at the request of the defendant: (2.) "The court charges the jury that if the use and occupation of the property is open, notorious and hostile

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against all the world, that is sufficient, if accompanied by the claim of ownership; and if such occupation continued for the period of twenty years, then the jury must find a verdict for the defendant, Mrs. Jane Thompson." (3) "The court charges the jury that actual notice is not necessary to be given to the owner of the property of the actual use, occupation and adverse possession of said property under claim of ownership, if that adverse possession is open, notorious, public and against all the world, accompanied by claim of ownership, then that is sufficient notice to the party plaintiff in this suit, and if that continued for twenty years, then you must find for defendant." (5) "No matter how defendant entered the land, if she openly, notoriously claimed it as her own, used and occupied it openly, notoriously and continuously for the period of twenty years, then the jury must find a verdict for the defendant, Mrs. Thompson." (6) "If the jury believe from the evidence that the defendant, Mrs. Thompson, has been in possession of the land sued for and described in the complaint, since the year 1864—and that she has held the same open and notoriously as against every body in the world, claimed the same for her own for this length of time even as against Frank John—then the verdict of the jury must be for the defendant, Mrs. Thompson. This will be the verdict even though Mrs. Thompson had no right to enter upon the lands at the first; yet, if entering thereupon, she had since held the same as her own for the time, from 1864, up to the commencement of this suit, the verdict must be for the defendant, Mrs. Thompson."

There were verdict and judgment for the defendant; and the plaintiff now brings this appeal, and assigns as error the rulings of the court in giving and refusing to give the respective charges asked.

JERE N. WILLIAMS and GEORGE W. PEACH, for appellant, cited *Burrus v. Meadors*, 90 Ala. 144; *Bishop v. Truett*, 85 Ala. 376; *Jones v. Pelham*, 84 Ala. 208; *Burks v. Mitchell*, 78 Ala. 61; *Robertson v. Bradford*, 73 Ala. 116; *Potts v. Coleman*, 67 Ala. 227; *Boykin v. Smith*, 65 Ala. 294.

H. D. CLAYTON, *contra*.

THORINGTON, J.—In the case of *Vandiveer v. Stickney*, 75 Ala. 225, re-affirming *Collins v. Johnson*, 57 Ala. 304, it was decided by this court that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as

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against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years; that the fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. And that it is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. And in 1 Amer. & Eng. Encyc. of Law, at page 280, the same doctrine is declared and supported by the citation of many decisions.

In the case at bar, appellee, who was the defendant in the court below, went into the possession of the land sued for by appellant, more than twenty years before the commencement of the suit, under a parol gift from her father, and the statement in the bill of exceptions is that "she, defendant, was in possession of the lands sued for in the year 1864, that she had occupied it continuously as her own, claiming it adversely to all persons publicly and openly and exercising acts of ownership over it until the present time;" and also, "that while she was in possession she cleared, cultivated and fenced a part of it, about fifteen acres, and she used the rest of it in getting rails and fire wood therefrom, and for other purposes when she saw fit." It also appears from the bill of exceptions that, soon after appellee so entered into possession of the lands, her father repeatedly said to her, and to others in her presence, that "he had given the lands to her as her own because her husband was killed in the war, and it would aid her in raising her orphan children."

Undoubtedly these statements of the evidence, in the bill of exceptions, show an adverse holding of the lands by appellee from the commencement of her possession, and with the knowledge of her father, and which continued a sufficient length of time to ripen into title, and there is nothing in the testimony which overcomes this proof. Whether her father had title to the property or not at the time of the parol gift it is immaterial to inquire. Appellee's right and title do not spring from the parol gift, but from her adverse possession and claim of ownership continued for a period of ten years.

The case of *Burrus v. Meadors*, 90 Ala. 140, and *Potts v. Coleman*, 67 Ala. 221, are distinguishable from the case at bar. In both of these cases the son entered on the land in recognition of, and in subordination to, the title of his

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father. In the case first mentioned, the son simply went into possession of the land with the consent of the father, the latter continuing to claim the land; and in the last mentioned case it is said in the opinion of the court: "It is manifest from the evidence that the son never intended the assertion of a title hostile to that of the father." While in the case at bar it is clear appellee's possession was hostile to her father's from its inception, and so openly and notoriously such, that the father must have known it; or such as to give rise to the presumption that he knew it.

It is urged by appellant that before the adverse possession of appellee ripened into title there was a recognition by appellee of her father's title, or an implied recognition on her part that the lands belonged to his estate. That contention is based on the testimony for appellant showing that the administrator of Frank John's estate rented the land one year to Alfred Faulk, and also that appellee, on one occasion, when the administrator was about to sell the lands under a chancery decree as part of the estate of said Frank John, requested the administrator to permit her to remove a fence she had placed on the land, and also that when the lands were so sold by the administrator, appellee bid on the land in controversy with the intention of purchasing the same. Appellee's testimony showed that, when the land was so rented to Faulk and he demanded possession, she refused to surrender and told Faulk the land belonged to her; that she had been holding and claiming it adversely for twenty years; and she further denies in her testimony that she requested permission from the administrator to remove the rails. These were questions for the jury, and they decided the issues in her favor. In explanation of her bidding on the land, it is shown by her testimony that she so bid after having publicly given notice at the sale of her claim to the property, and after having forbidden the sale, and under the advice of her attorney, that if she could buy the land at \$1.25 per acre, it would be better than to have a suit. Whether this would have been such a recognition of title in another as to interrupt the continuity of her adverse holding we need not decide.

It nowhere appears from the bill of exceptions that any of the facts above stated, as relied on by appellant to defeat the claim of adverse possession, occurred before the expiration of the period necessary to complete appellee's title. If her adverse possession continued for ten years, before any of the acts above referred to occurred, neither nor all of them could operate to divest her title so acquired. The title once ac-

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quired by adverse possession, it was as effectual and indefeasible as if it had been created by a valid conveyance, and could only be divested by some mode recognized by the law as sufficient for that purpose; it could not be done by parol in the manner indicated by this testimony. It the acts so relied on by appellant occurred before appellee's adverse holding had ripened into title, it was incumbent on appellant to show it. She has failed to do so, and consequently her case can receive no support therefrom.

A further reason urged against appellee's title by adverse possession is, that the land here sued for was sold as part of her father's estate under a decree of the Chancery Court in a cause to which she was a party, and was purchased at such sale by the plaintiff.

As these facts are set forth in the bill of exceptions, it is manifest the appellee is concluded by the chancery decree, she having been a party to the suit in which it was rendered; and it follows that charges two, three, five and six given at her instance should have been refused. They each rest her right to a verdict upon her adverse possession alone, ignoring entirely the proof and effect of the chancery decree to which we have above referred. The charge asked by the plaintiff is opposed to the principles we have announced and there was, therefore, no error in its refusal.

For the error in giving the several charges requested by the defendant, the judgment of the Circuit Court must be reversed and the cause remanded.

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Statutory Claim Suit.

99	100
99	123
99	100
124	305
99	100
1127	400
99	100
141	624

1. *Deed of trust; recitals of consideration not evidence against attacking creditor.*—The validity of a deed of trust being assailed by a creditor, whose debt was in existence at the time of its execution, its recitals of a consideration are not evidence against him.

2. *Same; burden of proof.*—In a statutory claim suit, where the claimant claims under a deed of trust, the validity of which is assailed by a creditor, whose debt was in existence at the time of its execution, the burden is on the claimant to prove the existence of the alleged debt, and the statements in the note and deed of trust are not available for this purpose.

3. *Same; admissibility of deed as evidence.*—This rule does not justify the entire exclusion of the deed of trust and the note secured by it from evidence in a claim suit founded upon them. The recitals

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of a consideration are admissible to prove the fact of the existence of these instruments, so as to show that, as between the grantor and claimant (trustee), there had been an effectual transfer of title to the property claimed; and the instruments themselves are admissible, in connection with other evidence afterwards adduced, as tending to show valuable and sufficient consideration, which was necessary in order to support a claim as against an attacking creditor.

4. *Testimony concerning other notes than the one in question; when competent.*—It is competent for a grantee in a deed of trust, given to secure a note held by him, to testify concerning other notes he formerly held against the grantor, without producing said notes, their existence being a collateral matter.

5. *Debt; arises when one pays a debt for another.*—A valid debt against a person may be created as well by paying off his debts to others, at his instance and request, as by advancing money directly to him.

6. *Evidence as to payment of debts admissible.*—It is admissible for a grantee in a deed of trust, attacked as fraudulent, to testify that he had paid debts for the grantor, at his request, and that the money so paid constituted a part of the consideration for the note and deed of trust.

7. *Evidence; when inquiry as to value of property material.*—Where a deed of trust is attacked as fraudulent against the grantor's creditors, the inquiry as to the value of the property conveyed in said deed is material upon the question of the good faith of the transaction.

8. *Same; use of memoranda to refresh memory of witness.*—It is not permissible for a witness, against the objection of the adverse party, to use for the purpose of refreshing his memory, memoranda made a long time after the date of the transaction to which it referred.

9. *Recorded mortgage of personal property not void because mortgagor is left in possession.*—A recorded mortgage of personal property is not void as against non-secured creditors by reason of the mortgagor being left in possession; the recording being regarded as a substitute for the change of possession.

10. *Mortgage of personal property; when pronounced void by the court.* A court can not pronounce, as a legal conclusion, that a mortgage of personal property is fraudulent and void as to existing creditors, unless it is shown upon its face, that it was made in trust for the use of the mortgagor, or with the intent to hinder, delay or defraud his creditors.

11. *Deed of trust attacked as fraudulent; burden of proof.*—When a creditor, attacking a deed of trust given to secure a debt of the grantor as fraudulent against the grantor's creditors, proves the existence of his debt at the time the deed was executed, the *onus* is cast upon the grantee to prove that the debt which the deed purports to secure was justly due at the time of its execution; but if the attacking creditor goes further and seeks to show that the deed was made with the intent to hinder, delay or defraud the grantor's creditors, the burden of proving this intent is upon such attacking creditor.

12. *Deed of trust not invalidated by provision allowing grantor to retain possession of property.*—A provision in a deed of trust, allowing the grantor to retain possession of the property conveyed, is not such a reservation of benefit to him as invalidates the instrument against his existing or subsequent creditors, if the debt which the instrument purports to secure was justly due, and the grantee was not a party to any intent to use the instrument to hinder, delay or defraud the grantor's creditors.

13. *Deed of trust given to secure bona fide debt not void, although hindering, delaying or defrauding the grantor's creditors.*—Although the

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effect of a deed of trust is to hinder, delay or defraud the grantor's creditors, and he executed the instrument with that purpose, yet, if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a *bona fide* debt to the amount named in the instrument, the deed of trust is not void, either because of its effect upon the rights of other creditors, or because of the fraudulent purpose of the grantor.

14. *Validity of deed of trust; proper inquiries; what can be shown.* On inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; that the deed covered substantially all of grantor's property, and greatly more than enough to secure grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt; that the grantor was allowed to retain and use the property, and that the property so retained and used was either perishable, or of such a character as to be profitable in its use. A deed of trust can not be pronounced invalid unless the jury find, from the evidence, that it was made either in trust for the use of the grantor, or with the intent, participated in by the grantee, to hinder, delay or defraud the grantor's creditors.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN B. TALLY.

Action by James H. Howell, against James W. Bowman. Judgment for plaintiff. An execution was levied on certain personal property in the possession of defendant, and a claim to the property levied on was interposed by H. W. Carden, as trustee under a deed of trust executed by defendant to secure the payment of his promissory note to R. T. Ewing.

On November 15, 1884, previous to the commencement of the present suit by the plaintiff, the defendant, James W. Bowman, executed a deed of trust to the claimant, H. W. Carden for the benefit of one R. T. Ewing, to whom said Bowman was indebted; the consideration named in the deed being \$482. The testimony of the claimant tended to show that the consideration of said trust-deed was a past indebtedness due by the said Bowman to Ewing, and that the said indebtedness consisted of various transactions between the said Ewing and Bowman. Some of the items were notes given by said Bowman to one Mrs. Tate, the mother-in-law of Ewing, and transferred by her to Ewing. On these Tate notes a greater rate of interest than 8 per cent. was charged by Mrs. Tate, but in all the demands and debts due Ewing by said Bowman only 8 per cent. interest was charged. It was further shown for the claimant that, at the time of the execution of said trust-deed for the benefit of said Ewing, he did not know of the existence of the plaintiff's debt against said Bowman. The plaintiff objected and duly ex-

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cepted to the court's allowing the claimant to introduce in evidence the trust-deed and the note made by said Bowman to said Ewing on November 15, 1884, which evidenced Bowman's indebtedness to Ewing. Upon the examination of said R. T. Ewing, he was allowed, against the plaintiff's objection and exception, to refresh his memory by reference to two memoranda—one made shortly after the transactions which resulted in the execution of the trust-deed, and the other just a short time before the trial of the present suit, which took place in 1890. This witness further testified against the objection and exception of the plaintiff, that there had been various transactions between him and said Bowman, and that there were other notes given by said Bowman to him, witnessing his prior indebtedness.

The court, among other things, charged the jury as follows: "The burden is first upon the plaintiff to make out his case. If the evidence satisfies you that the sheriff's deputy, having an execution issued by the justice of the peace on a judgment in favor of plaintiff against the defendant, found the property in controversy in the possession of the defendant, and he levied that execution upon such property, then, *prima facie*, that property would be liable to satisfy such execution. This would make out plaintiff's case. The burden would then be shifted upon the claimant to show a better claim to such property. If, upon considering the trust-deed under which claimant claims title to the property, in connection with the evidence offered with it, you find the same was given to secure a debt justly due from the defendant, then you would be authorized to find that the property, without more evidence, belongs to the claimant. Here the question of fraud in the execution of said trust-deed presents itself. The plaintiff insists that upon the whole evidence such conveyance is fraudulent and void. The burden of proving it is upon him. Upon proving a valuable consideration in the form of a just debt due from Bowman to Ewing, and the execution of the instrument to secure the same, the law presumes it was done in good faith, without further evidence, and the burden is cast upon the plaintiff to prove the fraud—to prove a state of facts which will warrant you in drawing the conclusion that it was in bad faith, or done for the purpose of hindering, delaying, or defrauding creditors of Bowman." The plaintiff excepted to this portion of the general charge of the court, and separately excepted to the court's refusal to give each of the following charges requested by him in writing:

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(1.) "If the jury find, from the evidence, that, at the time of the execution of the deed of trust under which Capt. Ewing claims the property that was levied upon by the execution in favor of Howell, Howell was a creditor of Bowman, and Ewing knew that Bowman was in failing circumstances, and took the deed of trust upon all of Bowman's visible and tangible property, stipulating in said trust-deed for a postponement of foreclosure of said trust-deed for a period of twelve months, and permitted Bowman to retain the possession of the personal property mortgaged, and Howell's execution was levied upon the property described in the officer's return on said execution, Ewing is not entitled to recover in this action." (2.) "If the jury find from the evidence that the property in controversy was of a perishable nature, and it, with other property included in the deed of trust, was all the visible property that Bowman had, and he was permitted to remain in possession of the property, and use it for his own benefit, by the trustee or Capt. Ewing, and Capt. Ewing knew at the time of the execution of the deed of trust that Bowman had other creditors, who would be hindered or delayed in the collection of their debts, the trust is void as to the property levied on, and, if it was in possession of Bowman at the time of the levy of the execution, that the plaintiff is entitled to recover in this action." (3.) "That unless the jury find, from the evidence, that the notes in evidence, claimed by Ewing to have been paid off by him, were based on a valuable consideration, then they are no part of the consideration of his debt claimed by him to support the claim suit. The mere fact that he paid them off at the request of Bowman does not raise any consideration in favor of the claimant." (4.) "If the jury find, from the evidence, that, at the time of the execution of the deed of trust upon which the claimant relies in this case, (to-wit, the trust-deed executed on the 15th November, 1884) Bowman was in failing circumstances, and Ewing knew it, and knew that Bowman had other creditors, who would be hindered or delayed in the collection of their debts against Bowman, and Ewing knew that the property conveyed by said trust-deed was all, or almost the whole, of the visible and tangible property that Bowman owned, and that the property conveyed by the deed of trust was equal in value to fifty per cent. more than the debt secured by it, and that Ewing gave Bowman twelve months' time within which to pay the debt secured by the mortgage or trust-deed, then the deed of trust is void, and the claimant can't recover in

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this action." (5.) "That if Bowman executed the deed of trust to hinder, delay, or defraud creditors, then if any fact or circumstance which, if followed up by Ewing, would have led him to discover the fraudulent intent of Bowman, had come to Ewing's knowledge previous to the execution of said deed of trust, in that event Ewing would be held in law as being a party to the fraud, and the deed of trust void as to plaintiff." (6.) "If the jury find, from the evidence, that Bowman executed the deed of trust for the purpose of hindering or delaying his other creditors, (if they find he had other creditors,) and Ewing knew it, or knew facts that were sufficient to excite suspicion in the mind of a reasonable man as to the good faith of Bowman in executing the deed of trust, which, if followed up, would have led to a discovery of his bad faith, then Ewing is chargeable with knowledge of the bad faith of Bowman in executing said trust-deed, and the claimant cannot recover in this action." (9.) "Every man is presumed to intend the necessary consequence of his acts; and if an act necessarily delays, hinders, or defrauds creditors, then the law presumes that it is done with the intent to delay, hinder, or defraud them." (11.) "If the jury, from the evidence in this cause, believe that, at the time the execution in favor of Howell was levied upon the property in controversy, the the property was in possession of Bowman; that the plaintiff thereby established a *prima facie* case, and it then became incumbent upon the claimant to establish his right to the property, and in order to do so he must show not only the existence of a debt, but that it is a valid debt, and that the conveyance was executed in good faith to secure that debt, and for no other purpose, before the claimant is entitled to recover; and if the jury find, from the evidence, that the deed of trust was executed and accepted for the purpose of hindering or delaying other creditors of Bowman, if they find that Bowman had other creditors, or for the purpose of tying up the property of Bowman from his other creditors, Bowman was permitted to retain the possession of the property mortgaged, then the claimant is not entitled to recover." (14.) "That unless the jury find, from the evidence, that the deed of trust introduced in this case was executed for a valuable consideration and in good faith, they must find for the plaintiff." (17.) "That if the plaintiff has made out a *prima facie* case in this action, under the charge of the court, then it devolves on the claimant to show, by proof to a reasonable certainty, that his claim suit is based on a

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claim for valuable consideration, and that his deed of trust was executed in good faith." (20.) "The law does not permit a person in failing circumstances to mortgage all his property to pay a selected creditor, and to put off the law-day of the mortgage to a distant day, and in the mean time retain the possession for his own benefit; and a mortgage so doing, when it is shown that the grantee had notice of the insolvency of the debtor, or was put on inquiry as to the condition of the debtor, is void as to existing creditors." (22) "That the giving of the deed of trust by Bowman to H. W. Carden for the benefit of Ewing upon all of his property was an admission on the part of Bowman of his inability to pay all of his debts, or at least renders his ability to pay doubtful; and, if Ewing took such a deed upon all of Bowman's property, Ewing was put on notice or inquiry as to Bowman's creditors." (23) "A particular intent to defraud creditors is not necessary, in order to render a conveyance fraudulent and void as against them. If the necessary consequence of the deed is to hinder and delay them, then it is fraudulent and void as to such existing creditors." (24) "The use to which a deed is applied is a circumstance or fact which the jury may look to in determining the intent with which it was made; and if the jury find from the evidence, that Ewing and Bowman have made use of the deed of trust last executed by Bowman to Carden for the benefit of Ewing to tie up the property of Bowman from his other creditors, then they are authorized to infer that it was executed by Bowman, and received by Ewing, for the purpose of hindering or delaying the other creditors of Bowman, if they find that Bowman had other creditors." (f) "If the jury find, from the evidence, that Ewing's debt against Bowman, that the deed of trust was executed to secure, is tainted with usury, then Ewing is not a *bona fide* purchaser for value of the property included in his said trust-deed, and it can not prevail against the plaintiff in this suit, if the jury find from the evidence that plaintiff was a creditor of Bowman at the time it was executed." There was judgment for claimant, and plaintiff appeals.

MATTHEWS & DANIEL, for appellant.

REEVES & CARDEN, *contra*.

WALKER, J.—An execution upon a judgment rendered by a justice of the peace in favor of the appellant and
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against J. W. Bowman, was levied upon personal property which was in the possession of Bowman. A claim to the property levied on was interposed by H. W. Carden, as trustee, under a deed of trust by which Bowman had undertaken to convey certain property, including that levied on, to secure the payment of his promissory note to R. T. Ewing. The contest was upon the claim so interposed. Exceptions were reserved to rulings of the Circuit Court in the admission of evidence, and in giving and refusing charges.

1. The objections to the introduction in evidence of the deed of trust to the claimant, and of the note which it purported to secure, were properly overruled. The subsequent introduction of independent evidence of the existence of a valuable consideration to support those instruments removed the principal ground of the objections. The validity of the deed of trust being assailed by the plaintiff as a creditor, whose debt was in existence at the time of its execution, its recitals of a consideration were not evidence against him. The *onus* was on the claimant to prove the existence of the alleged debt to Ewing, and the statements in the note and in the deed of trust could not help him in this regard. *Bolling v. Jones*, 67 Ala. 508. The plaintiff was entitled to have the jury instructed to this effect. But the rule that the recitals of consideration are not evidence against an attacking creditor would not justify the entire exclusion of the instruments. They were admissible to prove the fact of their existence, so as to show that, as between Bowman and the claimant, there had been an effectual transfer of title to the property in question. It was necessary for the claimant to go further, and prove the additional fact, necessary to the support of his claim as against the plaintiff, that the mortgage was supported by a valuable and sufficient consideration. The instruments were admissible in connection with the evidence, afterwards adduced, tending to show such a consideration.

2. It was competent for the witness Ewing to speak of one of the former notes he had held against Bowman without producing it. The fact of the existence of such note was a collateral matter, and the rule requiring the production of the note itself did not apply.—*Wollner v. Lehman*, 85 Ala. 274; 4 South. Rep. 643; 3 Brick. Dig., p. 439, § 486. A valid debt against a person may as well be created by paying off his debts to others, at his instance and request, as by advancing money directly to him. There was no error in permitting the witness Ewing to state that he had paid debts for Bowman, and that the money so used constituted

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part of the consideration for the note and deed of trust. The older deeds of trust on the land were admissible upon the question of the value of the property covered by the deed of trust to the claimant. The existence of prior incumbrances lessened the value of the property taken as security. The inquiry as to the value of the property conveyed as security was material upon the question of the good faith of the transaction.

3. One of the memoranda, which the witness Ewing was permitted to use for the purpose of refreshing his recollection, was made in the fall of the year preceding the trial, and long after the date of the transaction to which it referred. It is not permissible for a witness, against the objection of the adverse party, to use a memorandum to revive his memory, unless it was made at the time of the transaction concerning which he is questioned, or so recently thereafter that it may be inferred that the matter was then fresh in his mind.—*Calloway v. Varner*, 77 Ala. 541; *Jaques v. Horton* 76 Ala. 238; 7 Amer. & Eng. Encyc. of Law, 111. It is plain that a contemporaneous record of a transaction as it was originally impressed upon the mind, must be much more trustworthy than a memorandum made so long thereafter as to be itself but the result of an effort of the memory. The former leads the mind of the witness directly to the matter sought to be recalled, while the latter does not go beyond a former recollection, which may not have been distinct. The authenticity of a memorandum, to which a witness may look for a revival of his memory, should be vouched for by the fact that it was made so near to the date of the transaction to which it refers, that the original impression thereof could not have grown dim in the mind of the person who made it. A witness exposes himself to the hazard of being misled when he relies on a memorandum made at a time when his memory may already have become uncertain or indistinct. The witness should not have been permitted to refer to the memorandum mentioned above.

4. The owner of personal property has the right to mortgage it to secure the payment of his debts. To protect creditors and purchasers without notice, the statutes provide for the record of such conveyances.—Code, 188, §§ 1806-1814. These statutory provisions impliedly recognize the right of the mortgagor to stipulate in the instrument for his retention of possession of the mortgaged property, or to retain such possession with the consent of the mortgagee. The courts can not pronounce a recorded mortgage of personal property void, as against unsecured creditors, merely

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because the mortgagor is left in possession ; for the law permits that to be done, the recording being regarded as a substitute for a change of possession—Jones, Chat. Mort., (3d Ed.), §§ 329–380 ; *Benedict v. Renfro*, 75 Ala. 121. It is plain that this power of incumbering personal property, the possession of which is retained by the owner, may be readily perverted to the unlawful purpose of securing an unauthorized benefit to the grantor, or of hindering, delaying, or defrauding his creditors. But the law sanctions the *bona fide* use of this form of security, even though the debtor may be embarrassed or insolvent. The legitimate scope of such an instrument, as against the grantor's creditors, is the *bona fide* appropriation of property to secure a debt honestly due. If any part of the purpose of the parties thereto is that it shall avail, or be used for the ease or favor of the grantor, it is void as to his creditors.—*Reynolds v. Crook*, 31 Ala. 634. Whenever such purpose, or a trust for the use of the grantor, appears upon the face of the instrument, the court, without looking further, pronounces it void as against the grantor's creditors. Thus, a mortgage of merchandise, which expressly or impliedly leaves the mortgagor in possession, and free to make sales from the mortgaged property for his own benefit, in its very nature involves such a reservation of a benefit to the mortgagor as invalidates the instrument, and the court will pronounce it invalid as a conclusion of law.—*Benedict v. Renfro*, 75 Ala. 121 ; *Owens v. Hobbie*, 82 Ala. 466 ; 3 South. Rep. 145. If, however, the mortgage of such property provides for the sale thereof by the mortgagor for and on account of the mortgagee, and that the proceeds of such sales be applied to the mortgage debt, then such mortgage is not fraudulent on its face.—*Murray v. McNealy*, 86 Ala. 234 ; 5 South. Rep. 565. A mortgage of personal property can not be pronounced fraudulent without evidence *abundant* to this effect, unless it appears from an inspection thereof that the purpose of the parties embraces the reservation of a benefit to the mortgagor, or that there was an intent to have the transaction go beyond the legitimate object of securing a debt, and to operate, in part at least, to hinder, delay or defraud the mortgagor's other creditors. Unless such infirmity is disclosed upon the face of the instrument, the question of its validity as against the grantor's other creditors is one of fact, to be determined on the evidence as to the situation of the parties and the circumstances attending the transaction. In *Wiley v. Knight*, 27 Ala. 336, the facts were that a creditor, who had implied notice that the debtors were insolvent, took from them a mortgage of substan-

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tially all their property, the value of which greatly exceeded the amount of the debt to be secured. The law-day of the mortgage was postponed nearly six years; the possession, in the mean time, remaining in the mortgagors. The transaction was held to be fraudulent, because its necessary effect was to tie up more of the debtor's property than was reasonably necessary to secure the debt, and because of the unauthorized benefit reserved to the grantors. If the question as to whether there was fraud in the transaction is triable by the court, and it appears from the evidence that a creditor, knowing that there are other creditors who may be delayed or hindered in the collection of their debts, or having knowledge of some fact calculated to put him on inquiry, and thus charge him with notice, yet takes a mortgage whereby he ties up greatly more of the debtor's property than is reasonably sufficient to secure his debt, and in the mean time permits the debtor to remain so long in the possession and enjoyment of the property that the necessary consequence of the transaction is to favor the debtor, and to help him to baffle his other creditors, then such mortgage will be declared fraudulent in fact as against such other creditors.—*Reynolds v. Welch*, 47 Ala. 200. The same result follows whether the unauthorized operation of the instrument is disclosed by the terms thereof, or by evidence of the circumstances connected with its execution. In the present case, there is nothing in the impeached deed of trust, as it is described, without being copied, in the bill of exceptions, to authorize the court to pronounce it fraudulent on its face. The question, then, as to the validity of the transaction, was one of fact to be submitted to the jury. When the instrument shows upon its face that it was made in trust for the use of the mortgagor, or with the intent to hinder, delay, or defraud his creditors, the court must pronounce the legal conclusion that it is invalid as to such creditors. When such infirmity is not disclosed upon an inspection of the instrument, and it is attacked as fraudulent as against the mortgagor's creditors, unless both the law and the facts are submitted for decision by the court, it is for the jury to ascertain from the evidence as to the circumstances attending its execution whether, as matter of fact, it was made in trust for the use of the mortgagor, or with the intent, participated in by the mortgagee, to hinder, delay, or defraud the mortgagor's creditors.

When the attacking creditor proves the existence of his debt at the time the mortgage was executed, the *onus* is then cast on the mortgagee to show that the debt which the mort-

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gage purports to secure was justly due at the time of its execution. If this proof is made, and the evidence stops here, the attack upon the mortgage is not sustained. But the assailing party may go further, and prove that the mortgage was made with intent to hinder, delay, or defraud the creditors of the mortgagor. In this inquiry as to the intent, the burden of proof is shifted upon the complaining creditor. *Moog v. Farley*, 79 Ala. 246; *Gordon v. Tweedy*, 71 Ala. 102. The charge of the court on this subject was correct. Charges 11 and 17 requested by the plaintiff were properly refused, because each of them asserts, in effect, that when the plaintiff made out a *prima facie* case the burden was then cast upon the claimant, not only to prove that the secured debt was justly due, but also to negative the existence of a fraudulent purpose or intent in the making of the mortgage.

The mere retention of possession by the mortgagor, or a provision in the mortgage to that effect, is not such a reservation of a benefit to him as invalidates the instrument against his existing or subsequent creditors. Such a reservation of possession until default is authorized by the law, if the debt which the instrument purports to secure was justly due, and the mortgagee was not a party to any intent to use the instrument to hinder, delay, or defraud the mortgagor's creditors. It is the existence of such actual or necessarily imputed evil intent which will justify the impeachment of the instrument as a fraud upon creditors. It is not permissible for one creditor to use his claim for the purpose of shielding the debtor's property from his other creditors. Though one of the objects of such creditor is to secure the payment of his own debt, yet, if the arrangement by which this is done involves the intent on his part to aid the debtor in holding his property against his other creditors, then such arrangement is fraudulent and void as to creditors participating therein. To be valid, the arrangement must be "without any intent to lock up the property from creditors for the use of the debtor." When the creditor taking the security knows that there are other creditors who may be delayed or hindered in the collection of their debts, or has knowledge of facts or circumstances calculated to put him on inquiry, and thus charge him with notice, the arrangement which he makes must not go beyond the permissible purpose of securing his own demand; and if, with such knowledge or notice, he participates in a purpose of the debtor to thwart his other creditors, and with such intent takes a mortgage which ties up greatly more of the debtor's property than is reasonably sufficient to secure his debt,

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and in the meantime permits the debtor to hold and use the property for his own benefit, so that the necessary result is to favor the debtor, and to help him to baffle his other creditors, then the transaction is fraudulent and void as against other creditors. If it is any part of the purpose of the mortgagee, in taking the mortgage under such circumstances, to secure thereby a benefit to the mortgagor, which involves the hindering, delaying, or defrauding of any other creditors, the instrument can not stand against the attack of such other creditors.—*Benedict v. Renfro*, 75 Ala. 121; *Constantine v. Twelves*, 29 Ala. 667; *Price v. Mazange*, 31 Ala. 701; *Reynolds v. Welch*, 47 Ala. 200; *Price v. Masterson*, 35 Ala. 483; *Seaman v. Nolen*, 68 Ala. 463; *Hayes v. Westcott*, 91 Ala. 150; 8 So. Rep. 337. Though the natural effect of the transaction was to hinder, delay, or defraud the grantor's creditors, and though he executed the instrument with that purpose, yet, if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a *bona fide* debt of the amount named in the instrument, then the security could not be pronounced invalid, because of its effect upon the rights of other creditors, or because of the fraudulent purpose of the grantor. *Shealy v. Edwards*, 75 Ala. 411.

Whether the mortgagee participated with the debtor in an intention to have the mortgage serve the purpose of putting the property included therein in such a position as to secure an unauthorized benefit to the mortgagor, or to hinder, delay or defraud other creditors, is generally a matter of inference or deduction from the circumstances attending the transaction. Such transactions may be presented in various aspects, and it is not for the court to suggest what facts may warrant unfavorable inferences. On the inquiry as to whether the mortgage was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the mortgagor at the expense of his other creditors, it is competent to show that the preferred creditor, having notice that there were other creditors, took a mortgage covering substantially all of the debtor's property, and greatly more than enough to afford him ample security; or that by the arrangement he unreasonably postponed the collection of his demand, and in the meantime allowed the mortgagor to retain and use the property; or that the whole or a material part of the mortgaged property which was retained and used by the mortgagor was perishable, or of such a character as to be profitable in its use. It is for the jury to draw the deductions or inferences from the facts

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proved. The impeached instrument can not be pronounced invalid unless they find from the evidence that it was made in trust for the use of the grantor, or with an intent, participated in by the grantee, to hinder, delay, or defraud the grantor's creditors.

It is unnecessary to review in detail the numerous charges given and refused. The propositions contained in most of them may be readily tested by the rules above stated. Defects in the several charges requested by the plaintiff will be briefly noted. Charges 1, 2, 4, 5, 6, and 20, which were refused, were faulty in failing to predicate the existence of an intent on the part of the mortgagee to benefit the mortgagor, or to hinder, delay or defraud, his creditors. Charges 9 and 23, requested by plaintiff, make the effect of the instrument upon the rights of other creditors the test of its validity, without regard to the real intent of the grantee therein. If the debt to Ewing was based upon his payment in good faith of claims against Bowman, at Bowman's request, such payment was a valuable consideration moving from Ewing, which was not vitiated by the fact that the claims so paid off in good faith were not themselves supported by valuable considerations. Charge 3 of the plaintiff's series was incorrect in asserting the contrary of this proposition. Plaintiff's charge 14, was properly refused because there were several deeds of trust in evidence, and the charge did not refer specifically to the one which was the matter of contest. Charge 22 assumes that the deed of trust in question covered all of Bowman's property. There was evidence tending to show that some of his property was not included. Charge 24 was argumentative. Unless the usury in the debt to Ewing was allowed and received for the purpose of fraudulently swelling the debt, it would not have effect to avoid the deed of trust.—*Harris v. Russell*, 93 Ala. 59; 9 So. Rep. 541. Charge *f*, on this subject, was properly refused.

Reversed and remanded.

[Brown, Adm'r, v. Burnum.]

99	114
105	629

99	114
137	513

Brown, Adm'r, v. Burnum.*Bill in Equity for the Settlement of a Partnership.*

1. *Sale by one partner to another; adequate legal remedy*—A sale by one partner to another of his interest in a partnership, unless it is otherwise provided by the contract of sale, operates such a change in the position of the seller that he no longer has any claim, based upon the existence of the partnership relation, which would justify an accounting between the two partners; and the compensation agreed to be paid must be enforced at law, equity having no jurisdiction to enforce the agreement.

APPEAL from the Chancery Court of St. Clair.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by the appellee, Francis M. Burnum, against Charles G. Brown, as administrator *de bonis non* of the estate of Robert Caskey, deceased; and prayed for an accounting and settlement of the affairs of a partnership, previously existing between the complainant and the respondent's intestate. The respondent demurred to the bill, and also made a motion to dismiss the same for the want of equity. The chancellor overruled the demurrer and the motion; and on the final submission of the cause, on the pleadings and proof, decreed that the complainant was entitled to the relief prayed for. The present appeal is prosecuted by the respondent, and the decree of the chancellor on the demurrer and motion and his final decree are here assigned as error.

BUSH & BROWN and WATTS & SON, for appellant, cited *Clark v. Clark*, 4 Porter, 9; *Hart v. Clark*, 54 Ala. 490; *Reese, Adm'r. v. Bradford*, 13 Ala. 837; *Peacey v. Peacey*, 27 Ala. 683; *Griffith v. Buch*, 13 Md. 102; 1 Bates on Partnership, 33, 550, 551; 2 Bates on Partnership, 636-38, 634, 918-921-922.

JOHN W. INZER, *contra*, cited *Brewer v. Brewer*, 19 Ala. 481; *Maurick v. Donaldson*, 1 Ala. 532; *Larkin v. Rodes*, 5 Porter, 95; 3 Brickell's Digest, 514, § 100; *Chester v. Dickerson*, 54 Ala. 1; 1 Lindley on Partnership, page 83.

WALKER, J.—The bill alleges that the partnership between the complainant Burnum, and Robert Caskey, the in-

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testate of the defendant, was terminated in August, 1886, by Caskey purchasing the interest of the complainant in the business for the sum of one thousand dollars, to be paid in January, 1887, and agreeing to pay all the firm debts, and to pay back to the complainant all debts and liabilities of the partnership which he had paid and settled during its existence, including money paid for or on account of options, opening and developing minerals, board of hands, and board of Robert Caskey himself. The complainant seeks an enforcement of his rights under this contract with Caskey. To this end he prays an accounting and settlement of the affairs of the partnership. The defendant demurred to the bill, setting up, among other grounds, the adequacy of complainant's remedy at law.

So long as a partner retains his interest in the partnership he has a lien on the partnership effects to secure their application to the full payment and discharge of all debts and liabilities of the partnership, before any partner or his representative, or any individual creditor of such partner, can claim any right or title thereto; and, also, for the amount of his share, after the partnership debts have been paid, and for moneys advanced by him beyond that amount for the use of the partnership. For the enforcement of such a lien the aid of a court of equity may be invoked. But when one partner sells, without a reservation, his interest in the partnership to a co-partner, this lien is extinguished, and the effects become the exclusive property of the purchasing partner. When such a sale is made there is no longer a lien for the enforcement of which resort must be had to a court of equity. This ground of equitable interposition for the settlement of the partnership affairs no longer exists. *Hart v. Clark*, 54 Ala. 490; *Levy v. Williams*, 79 Ala. 171; *Reese v. Bradford*, 13 Ala. 837.

In *McGown v. Sprague*, 23 Ala. 524, it was held, that the selling partner was equitably entitled to be reinvested with his original rights as partner, when the purchasing partner, who had undertaken to pay all the partnership debts, instead of performing his agreement, left the debts unpaid, and absconded, leaving numerous individual creditors claiming the right to subject to their demands the property which had belonged to the partnership. The conduct of the purchasing partner in that case was treated as a fraud upon the selling partner which equitably entitled the latter to a rescission of the contract of sale, so far as it operated to deprive him of a lien upon the partnership effects to have them applied to the payment of the partnership debts. The

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ground upon which the equity of the bill in that case was rested is not disclosed by the averments of the bill in this case. Here, there is no allegation of the insolvency of Caskey in his lifetime or of his estate since his death. It is not claimed that the sale, if allowed to stand, will have operated as a fraud upon complainant's rights as a partner. There is no effort to avoid the effect of that sale. It is set up as a valid transaction and the complainant is claiming under it. In these circumstances there is no room for the operation of the rule laid down in *McGown v. Sprague*, *supra*. There is, therefore, no occasion now to consider the propriety of that ruling.

The sale of his interest in the partnership by one partner to another, unless it is otherwise provided by the terms of the contract of sale, operates such a change in the position of the seller that he no longer has any claim based upon the existence of the partnership relation, which from its very nature, as each partner is liable for all the debts of the partnership and is entitled to a distributive share of the effects only after a sufficiency thereof has been applied to satisfy and discharge the firm liabilities, requires an accounting and a final closing of the partnership affairs, to ascertain what, if any, balance is due to each partner; but in the place of such a claim, for the enforcement of which legal remedies are inadequate, he acquires rights against the purchaser which are defined by the terms of the contract of sale, and for the ascertainment and enforcement of which a settlement and winding up of the partnership affairs may be wholly unnecessary. The contract rights of parties must be enforced by legal remedies, unless the inadequacy of such remedies is shown. An action at law can be maintained for any violation of an agreement by a purchasing partner to pay a stipulated price for the interest of the selling partner, to discharge and satisfy the outstanding debts of the dissolved partnership, and to pay the selling partner the value of services rendered by him and the amounts paid out by him for the firm while it was in existence.—*Peacey v. Peacey*, 27 Ala. 683; *Hogan v. Calvert*, 21 Ala. 194; *Rowland v. Boozer*, 10 Ala. 690; *Clark v. Clark*, 5 Porter, 9; *McCall v. Oliver*, 1 Stewart, 510; *Hunt v. Rogers*, 7 Allen, 469; 2 Bates on Partnership, § 634. No ground of equitable interposition is disclosed by the circumstance that the seller, if his claim of damages for breaches of the contract of sale is controverted, must prove the existence and amount of the firm debts remaining unpaid, and also numerous items of expenses incurred, or disbursements made, by himself. In

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the absence of any showing to the contrary, it must be presumed that the proof of such facts may as well be made in a court of law as in a court of equity. The sale having terminated the partnership relation and reduced the selling partner's claim to a purely legal demand against the purchaser, and the averments of the bill disclosing no such case of mutuality or complication of accounts as to justify the interposition of a court of equity on either of those grounds, we are unable to discover in what respect the legal remedies available to the seller are inadequate. Our conclusion is that the ground of demurrer above mentioned was well taken, and should have been sustained.

Reversed and remanded.

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Bill in Equity to Redeem Lands Sold Under a Mortgage.

1. *Tender; what necessary when purchaser is a non-resident.*—When a bill is filed to redeem lands sold under a mortgage, and the purchaser is absent from the State, a tender to be sufficient must be made by a deposit of the money in court on the filing of the bill.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by the appellant, Eugene Beebe; and sought to redeem from the appellee, W. H. Buxton, certain real estate which had been sold under the power of sale contained in a mortgage by said Beebe & Henshaw, the said Buxton being the purchaser at said sale. The bill was filed on the last day within two years after the sale, and avers the execution of the mortgage, default in the payment of the debt secured thereby, the sale under the power, the purchase by said Buxton at said sale, and the delivery of possession to the purchaser within ten days after such sale.

The complainant averred that he was unable to tender the purchase-money with ten per cent. interest *per annum* thereon, because of the non-residence of Buxton, but offered in said bill "to pay the said Buxton the purchase-money paid by him for the said property, with ten per cent. *per annum* thereon, and all other lawful charges he may have against the said property." But the amount of the purchase-money, with interest, was not paid into court.

99	117
101	608
99	117
103	482
99	117
114	57
99	117
121	972
99	117
125	680
99	117
130	254
99	117
138	803
99	117
142	508

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The respondent demurred to the bill on the ground of want of proper tender, in the failure to pay the money into court.

The chancellor sustained this demurrer; and the present appeal is prosecuted from his decree in this behalf, and the same is here assigned as error.

A. A. WILEY, and TOMPKINS & TROY, for appellant.

BRICKELL, SEMPLE & GUNTER, *contra*.

WALKER, J.—The statutory right of redemption is purely the creature of legislation, and can only be exercised by the persons named in the statute, in the mode, within the time and upon the conditions there prescribed.—*Powers v. Andrews*, 84 Ala. 289. One of the essential conditions to the exercise of the right is the payment or tender by the redemptioner to the purchaser or his vendee of the purchase-money with ten per cent. *per annum* thereon, and all other lawful charges. Code, § 1881; Acts of Ala., 1888-89, p. 764. The statute not specifically prescribing the mode in which the tender must be made, the absence of the purchaser or his vendee from the State is recognized as an excuse for a failure to make the tender to him in person, and as occasioning a necessity to file a bill for a redemption, in which the tender may be made. To the sufficiency of a tender made in this way the payment of the money into court is essential.—*Spoor v. Phillips*, 27 Ala. 193; *Trimble v. Williamson*, 49 Ala. 525; *Alexander v. Caldwell* 61 Ala. 543; *Caldwell v. Smith*, 77 Ala. 157; *Stocks v. Young*, 67 Ala. 341. When the bill is one to enforce the equitable right of redemption before foreclosure, an offer therein to pay all that may be found due, on the taking of the account prayed, is sufficient. In such case an averment of a tender before the filing of the bill is only material as effecting the question of costs, and is not essential to the equity of the bill.—*Thomas v. Jones*, 84 Ala. 302; *McGuire v. Van Pelt*, 55 Ala. 344. The statutory right of redemption is a wholly different matter. As the statute clearly makes a payment or a tender a condition to the exercise of the right, we think that such payment or tender must be made to the purchaser or his vendee in person, or, when that is not practicable, by the deposit of the money in court on the filing of the bill to redeem. The bill in the present case alleges that there are no lawful charges known to the complainant against the property sought to be redeemed except the pur-

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chase-money and interest. The complainant could by his bill have tendered the amount which, according to his averments, he was bound to pay. Because of the failure to make the tender in the bill, the complainant does not show himself entitled to the relief prayed. The grounds of demurrer suggesting this defect in the bill were properly sustained.

Affirmed.

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Bill in Equity to Foreclose a Mortgage.

1. *A recorded mortgage of personal property is not void because the mortgagor is left in possession.*—A recorded mortgage, conveying both realty and personal property is not invalidated as to the personalty by reason of the fact that the mortgagor is left in possession of such personal property until default; the recording of a mortgage, as directed by the statute, is regarded as a substitute for a change of possession.

2. *Appointment of receiver, notwithstanding sale of property under attachment.*—The fact that non-secured creditors of a mortgagor have attached and sold the personal property mortgaged, does not defeat the paramount lien of the mortgage, so as to prevent the appointment of a receiver, on the application of the mortgagee, to take charge of the property; and this notwithstanding its sale under the attachment.

3. *A creditor can not claim under a mortgage which he attacks as fraudulent.*—A creditor, who has attacked the validity of a mortgage as having been made to defraud the mortgagor's creditors, can not insist that the mortgage so attacked, together with another previously executed, should be construed together as a general assignment for the benefit of all the mortgagor's creditors; one can not claim both under and against a mortgage.

4. *Mortgage given to secure a bona fide debt not void.*—Although the effect of a mortgage is to hinder, delay or defraud the mortgagor's creditors, and it was given for that purpose, yet, if the mortgagee did not participate in such intent, but accepted the mortgage for the sole purpose of securing a bona fide debt of the amount named in the instrument, the mortgage is not invalid because of such effect, or because of the fraudulent intent of the grantor.

5. *Mortgage on personal property; to be recorded in county where property is located.*—A mortgage on personal property situated in this State, but executed by a non-resident, should be recorded in the county in which the property is situated. (Code, § 1806.)

6. *Sufficient description of personal property in a mortgage.*—A mortgage on real estate and certain designated personal property, "and other implements," constituting a mining out-fit, "now at the mine

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known as the P. Mine," contains a sufficient description of the personality so conveyed, as to render it capable of ascertainment, though such description does not of itself identify all of the personality.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed April 29, 1890, by the Berney National Bank, against Thomas H. Dunn, Fannie H. Dunn, C. J. Cooper & Co., W. A. Scarbrough, Eba Scarbrough, Flem Higgins and R. P. Thomason. The prayer of the bill was for the foreclosure of a mortgage, executed by Thomas H. Dunn and his wife, Fannie H. Dunn, and for the appointment of a receiver to take charge of the property covered by the mortgage, and for an injunction restraining the purchasers at a sale under an attachment from disposing of the property. A receiver was duly appointed and ordered to take charge of the property.

The mortgage, which was sought to be foreclosed, as is shown by the bill, and the mortgage itself, which is an exhibit thereto, was executed by Thomas H. Dunn and his wife, Fannie H. Dunn on December 29, 1887, and was given to secure a note bearing the same date, given by said Dunn to the Berney National Bank, and which matured ninety days after date. This mortgage conveyed certain described real estate and personal property, which latter was described therein as follows: "railroad track, tram cars, washers, engine, boiler, hoisting drum, mules, tools, scales, and other implements, now at the mine known as the Pendergrass mine." All of the property mortgaged was situated in Calhoun county, Alabama. This mortgage contained the following provisions: "It is further understood and hereby declared and agreed that the giving of this mortgage is not intended as a substitute for, or in any way to effect the said mortgage, dated the 8th of August, 1887, but that said mortgage is to remain in full force and effect as a security for the said debt, and that said note herein described for \$9,038.22 is a renewal of the bills and notes specifically described in said mortgage of 8th of August, 1887, and that if the said Thos. H. Dunn, at any time should apply for and obtain from said party of the second part a renewal of said note for \$9,038.22, or extension of his said debt in any form, both this mortgage, as well as the one of August 8th, 1887, shall stand and remain a security for such renewal or extension in whatever form it may be given. It is further understood and agreed that said Dunn is to remain in the possession of the premises and property hereby mortgaged, and to work the mines, until the maturity of said note." It was

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also provided in said mortgage that upon the failure of said Dunn to pay the debt at its maturity, the mortgagee should have the right to take possession of the property and sell the same, and "to become the purchaser of any of said property in the same manner as any other person." There were several extensions of the note by the bank to Dunn, and the said mortgagor, Dunn, was permitted to remain in possession of the property until March 21, 1890. On the last named date, March 21, 1890, C. J. Cooper & Co., a mercantile firm doing business in Calhoun county, sued out in the Circuit Court of Calhoun county, an attachment against the said Dunn, which was levied upon the personal property conveyed in the mortgage. After the levy of this attachment, and after proper advertisement, the sheriff sold said property, as perishable property, on April 21, 1890, and at said sale the respondents W. A. Scarbrough, Eba Scarbrough, Higgins and Thomason became the purchasers of the property, and the sheriff delivered the same to them. The bill averred, that upon the demand by complainant from these purchasers for the surrender of the property so purchased, they refused to deliver the property unto the complainant; and the injunction prayed for was to restrain them from selling or disposing of any of the property so purchased by them.

In answer to the bill, the respondents, C. J. Cooper & Co. averred that they were creditors of the said T. H. Dunn at the time of the execution of said mortgage to the complainant, and they further alleged that said mortgage was made by said Dunn for the purpose of hindering, delaying and defrauding his other creditors; that it was fraudulent and void by reason of the reservation of a benefit to said Dunn, in that he was left in possession of said property, and given the use of the property until the law day of the mortgage, and a long time thereafter, to the injury of his other creditors; and that the mortgages executed on August 8th and December 29, 1887, should be construed to be a general assignment for the benefit of all his creditors.

Subsequent to the filing of the bill, a judgment was rendered in the Circuit Court against Thomas H. Dunn, in favor of C. J. Cooper & Co., condemning the property levied upon under the attachment to the satisfaction of the judgment, and ordering the proceeds of the sale thereof to be delivered into court. These facts were pleaded by the respondents by special pleas, but, on motion of the complainant, these pleas were stricken from the file. The respondents demurred to the bill, on the ground that it contained

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no equity, and that the complainant had an adequate remedy at law. The chancellor overruled this demurrer; and upon the final submission of the cause, upon the pleadings and proof, granted the relief prayed for, and decreed that the complainant have a mortgage lien upon all of the property conveyed in the mortgage, and ordered a reference to the register to ascertain and report which of the personal property in the hands of the receiver was subject to the mortgage; the respondents having alleged that certain portions of said property was not covered by the mortgage.

The present appeal is prosecuted by the respondents, and the decrees of the chancellor are here assigned as error.

MATTHEWS & WHITESIDE and E. H. HANNA, for appellant. The bill shows that the complainant had an adequate remedy at law.—*Curry v. Peebles*, 83 Ala. 225; *Tyson v. Brown*, 64 Ala. 244; *Shepperds v. Turpin*, 3 Grat. 373. The court erred in appointing a receiver.—*Dollins v. Lindsey*, 89 Ala. 217. The mortgage executed on December 29, 1887 was fraudulent as to existing creditors.—*Sims v. Gaines*, 64 Ala. 396; *Hubbard v. Allen*, 59 Ala. 296; 62 Ala. 243; 78 Ala. 98; 89 Ala. 446; 84 Ala. 592. The mortgage should have been recorded in Jefferson county, where the evidence showed Dunn resided.—*Pollak v. Davidson*, 87 Ala. 551; Code, § 1806. The mortgages of August 8, and December 29, 1887, should be construed as a general assignment.—*Danner v. Brewer*, 69 Ala. 191; *Holt v. Bancroft*, 30 Ala. 93.

CALDWELL & JOHNSTON, *contra*.—The mortgage was not fraudulent by reason of the mortgagor being left in possession.—*Dunlap v. Steele*, 80 Ala. 424; *Wiley v. Knight*, 27 Ala. 346; *McWilliams v. Rodgers*, 56 Ala. 81; 1 Jones on Mortgages, §§ 627, 664, 657, 658, 702; *Heflin v. Slay*, 78 Ala. 182; *Woodward v. Parsons*, 59 Ala. 625; *McMillan v. Otis*, 74 Ala. 565; *Coker v. Shropshire*, 49 Ala. 542. To make the instrument fraudulent and void, as against creditors, there must be a fraudulent intent on the part of the grantor known to and participated in by the grantee, and it must be known to the grantee that the grantor is insolvent.—*Marshall v. Croom*, 60 Ala. 121; *Shealy v. Edwards*, 75 Ala. 411; *Hoyt v. Turner*, 84 Ala. 523; *Truss v. Davidson*, 90 Ala. 359.

THORINGTON, J.—The principles of law which govern the material questions raised on this appeal have been clearly settled by recent decisions of this court; testing the provisions of the mortgage, attacked by appellants as frau-

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dulent and void, by these decisions we must affirm that it is not vitiated by anything appearing on the face of the instrument.

That the mortgage by its terms provides for the retention of the property by the mortgagor and the use thereof until the law-day of the instrument, does not, in view of the nature of the property, invalidate the mortgage as to existing or subsequent creditors of the mortgagor, there being nothing on the face of the mortgage to indicate an intent on the part of the mortgagee to use the instrument to hinder, delay or defraud the mortgagor's creditors.

The statutory provisions regulating the registration of mortgages of personal property, by implication, recognize the right of the mortgagor to stipulate in the instrument for his retention of possession of the mortgaged property. As was said in *Howell v. Carden*, ante p. 100; 10 So. Rep. at p. 644, "The courts cannot pronounce a recorded mortgage of personal property void, as against unsecured creditors, merely because the mortgagor is left in possession; for the law permits that to be done, the recording being regarded as a substitute for a change of possession."

It is unnecessary to discuss the rulings of the Chancery Court upon the specific grounds of demurrer to the bill of complaint and the objections to testimony. The validity of the mortgage both as matter of law, upon an inspection of the instruments and upon the testimony, is clearly sustainable on the authority of the case of *Howell v. Carden*, supra.

The mortgage being a valid security there was no error in the ruling of the court striking the appellant's plea from the file on appellee's motion. The attachment and sales thereunder could not avail appellants against the paramount lien acquired by appellee through its mortgage, and which lien, under the facts alleged, authorized the appointment of a receiver to take charge of the property notwithstanding its sale under attachment.—*Dollins & Co. v. Lindsey & Co.*, 89 Ala. 217.

We can not consider the proposition urged by appellant, that the two mortgages of Aug 8, 1887, and Dec. 20, 1887, must be construed together as one general assignment enuring to the benefit of all the creditors of the mortgagor alike. Appellant has elected to attack the last mentioned mortgage as fraudulent and void; in doing that he claims against the mortgage and not under it. If the two instruments were executed under circumstances which would authorize the court to declare them one general assignment for the benefit of all the mortgagor's creditors, appellants have not pursued

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the proper course to have them so declared. They can not be heard to claim both under and against the mortgage. *Hatchett v. Blanton*, 72 Ala. 423.

When we speak of the validity of the mortgage being established by the testimony, our meaning is that such must be the conclusion when tested by the principles declared in the case of *Howell v. Carden*, to which we have above referred. Among other things, it is said: "When the attacking creditor proves the existence of his debt at the time the mortgage was executed, the *onus* is then cast on the mortgagee to show that the debt, which the mortgage purports to secure, was justly due at the time of its execution. If this proof is made, and the evidence stops here, the attack upon the mortgage is not sustained. But the assailing party may go further, and prove that the mortgage was made with intent to hinder, delay or defraud the creditors or the mortgagor. In this inquiry as to the intent, the burden of proof is shifted upon the complaining creditor." And again: "Though the effect of the transaction was to hinder, delay or defraud the grantor's creditors, and though he executed the instrument with that purpose, yet if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a *bona fide* debt of the amount named in the instrument, then the security could not be pronounced invalid because of its effect upon the rights of other creditors, or because of the fraudulent purpose of the grantor."

That a *bona fide* debt is established by the proof, for the security of which the mortgage was given, can not be doubted; and there is an absence of any affirmative proof, on the part of appellants showing actual fraud, which could be imputed to either the mortgagor or the mortgagee, unless it exists in the permissive retention and use of the personal property by the mortgagor after the law-day of the mortgage had passed. This fact, however, could not operate to invalidate the mortgage, unless it was within the agreement of the parties, at the time the mortgage was executed, that such possession should continue after the law-day of the mortgage for the purpose of benefitting the mortgagor, or of hindering, delaying or defrauding his other creditors in the collection of their debts. We find nothing in the proof to warrant such an inference.

The contention of appellants that the mortgagor was a resident of Jefferson county, and that, therefore, the mortgage should have been recorded in that county in order that it might be self-proving, and also operate as constructive notice as to the personal property embraced therein, is not

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sustained by the proof. It sufficiently appears that the mortgagor, Dunn, was a non-resident of this State when the mortgage was executed; that his family and home were in Mississippi, and that he was not a resident of Jefferson county, but there temporarily for business purposes. His brother, E. J. Dunn, in answer to the 2d cross-interrogatory propounded to him by appellants, says: "Thomas H. Dunn lived at Columbus, Miss, on the 29th day of December, 1887." There is proof tending to show that he lived in Birmingham, Ala in December, 1889; but that is not contradictory of the statement of his brother as to his residence in 1887, nor is there anything in the testimony to overcome that statement. The record of the mortgage was properly made, therefore, in the county where the property was situated at the date of the mortgage.—Code of 1886, § 1806.

It appearing from the proof that the property covered by the mortgage was in Calhoun county at the date of the mortgage, and the latter having been properly acknowledged and recorded within twelve months, there was no error in admitting it in evidence without proof of its execution. Nor was there error in that part of the decree of the Chancery Court referring it to the register to ascertain and report a statement of the personal property covered by the mortgage. The mortgage embraced real estate and certain designated personal property, "and other implements" constituting a mining outfit, and described as "now being at the mine known as the "Pendergrass mine." The description of this mining outfit in the mortgage does not of itself identify all the personalty included in its general terms, but is sufficiently definite to render the property referred to capable of certain ascertainment, and was a proper matter of reference to the register for that purpose.

There was no error in the proceedings and decree of the Chancery Court from which injury could have resulted to appellants; and its decree is accordingly affirmed.

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Action of Ejectment.

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1. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely

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to the grantor, is void as against the adverse possessor and the persons in privity with him, and will not support ejectment by the grantee against such adverse holder. But as to all others, and as between the parties themselves, it is valid and operative.

2. *Right of grantee to use grantor's name in an action of ejectment.*—A conveyance of land adversely held authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property; and the grantor can not prevent such use of his name by the grantee.

3. *Same.*—The grantor in a conveyance of land held adversely can not, by a subsequent release or conveyance to the adverse holder, or by an order to dismiss, defeat an action of ejectment brought in his name for the recovery of the land from the adverse holder, for the benefit of the first grantee.

APPEAL from the City Court of Birmingham.

Heard before the Hon. W. W. WILKERSON.

This was a common law action of ejectment, and was commenced on July 26, 1888. In the declaration as amended, there were three demises. One in the name of David Pearson, another in the name of S. P. Waits, and the third in the name of John D. Strange and J. H. White. After the commencement of the suit, David Pearson, in whom one of the demises was laid, having died, upon motion of the plaintiff, it was revived, as to that demise, in the name of his heirs-at-law, and of the administrator of his estate. The appellee, P. G. King, as landlord of R. M. Ray, was admitted to defend, and pleaded, first, the general issue, and second, by special plea, that since the commencement of the suit all of the heirs-at-law of David Pearson, deceased, had conveyed to the said defendant, all their right, title and interest in the land in controversy. The plaintiffs' demurrer to this plea being overruled, they filed a replication to plea number two, the substance of which is stated in the opinion. The defendant demurred to this replication to plea number two, on the ground, that there was nothing contained in the said replication which precludes or debars him from the defense set up in said plea; and that it appears from said replication that the conveyance by Pearson to White and Strange was executed to them while King, the defendant, was in the adverse possession of the premises, claiming title thereto. This demurrer was sustained by the court, and its rulings thereon constitute the ground of one of the assignments of error.

As the opinion of the court only considers the assignments of error addressed to the rulings of the court upon the pleadings, it is not deemed necessary to set out any other facts in detail.

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WEBB & TILLMAN, for appellant.—The deed of David Pearson's heirs to King did not defeat the right of Strange and White to recover the land in the name of their grantor, David Pearson, if it was held adversely at the time of Pearson's deed to them.—*Davis v. Curry*, 85 Ala. 134; *Bernstein v. Humes*, 60 Ala. 582; *Steeple v. Downing*, 60 Ind. 487; *Farnum v. Peterson*, 11 Mass. 151; *White v. Patton*, 24 Pick. 324; *McMahan v. Bowe*, 114 Mass. 145; Sedgwick & Wait on Trial of Title to Land, § 190.

BROOKS & BROOKS, *contra*, cited *Alexander v. Collins*, 7 Ala. 480; *Scranton v. Ballard*, 64 Ala. 402; *Davis v. Curry*, 85 Ala. 133; 3 Brick. Dig., p. 18, § 51.

WALKER, J.—This is a common-law action of ejectment. David Pearson, in whom one of the demises was laid, having died pending the suit, it was revived as to that demise in the names of his heirs-at-law, and of the administrator of his estate. The defendant interposed a special plea, to the effect that since the commencement of the suit, the heirs of David Pearson had executed a conveyance of the land sued for to the defendant. A demurrer to this plea having been overruled, the plaintiffs interposed a replication thereto, to the effect that before the beginning of the suit, David Pearson was seized of the legal title to the land sued for, and executed a conveyance thereof to Strange and White, when he knew that the land was in the adverse possession of the defendant's tenant; that this action was begun and is prosecuted for the use and benefit of said Strange and White; that the deed to them was duly recorded before the execution of the conveyance by Pearson's heirs to the defendant, and that the defendant had notice of David Pearson's deed to Strange and White when he obtained the deed from David Pearson's heirs to himself pending this suit. The defendant's demurrer to this replication was sustained.

It is well settled that a sale and conveyance of lands, which are at the time in the possession of a third person holding adversely to the grantor, is void as against the adverse possessor, and will not support ejectment by the grantee against him.—3 Brick. Dig. p. 18, § 51. The grantor in such conveyance may still maintain ejectment against the adverse holder, and the latter can not plead the conveyance in bar of the suit. The conveyance is void as to him, and he can not set it up as a defense.—*Davis v. Curry*, 85 Ala. 133. The conveyance is void only as against the adverse possessor and persons in privity with him. As to all others, and as between the parties, it is valid and operative.—*Yarborough*

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v. Avant, 66 Ala. 526; *Harvey v. Doe, ex. dem. Carlisle*, 23 Ala. 637; *Abernathy v. Boazman*, 24 Ala. 189. The execution of the deed imports that the grantor intends to vest the title in his grantee, and to confer upon him the beneficial enjoyment of the property, so far as that result may be accomplished legally. Because of the rule of law which invalidates the deed as against the adverse holder, it can not operate to authorize the grantee to sue in his own name for the recovery of the land from such adverse holder. But this rule of law does not stand in the way of the grantor authorizing the use of his name in a suit for the recovery of the property. Courts of law long ago recognized the right of a transferee of a *chose* in action, which was not assignable under the common law, to use the name of the transferor in a suit thereon. Though such assignment was void as to the debtor, yet it bound the creditor to permit the use of his name by his transferee for the enforcement of the demand. On like considerations it has been held, that a conveyance of land adversely held, authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property. The question was presented in the case of *Steeple v. Downing*, 60 Ind. 478-487. It was there said: "We are satisfied, both upon reason and authority, that where one conveys land to another, which at the time is in the adverse possession of a third person, whereby the title can not pass as against the party thus in possession, the grantor impliedly authorizes the grantee to use his, the grantor's, name, in an action to recover the land from the party thus in the possession thereof." The result of the decisions has been stated to be, that the deed is construed to be a power of attorney authorizing the grantee to use the grantor's name, as plaintiff in ejectment, to recover the lands, even against the will of the latter.—Sedgwick and Wait on Trial of Title to Land, (2d Ed.) § 190. The recovery enures to the benefit of the grantee, though the action is prosecuted in the name of the grantor. *Brunson v. Morgan*, 86 Ala. 318.

It is a general rule, that there can be no recovery in favor of the plaintiff on the record, after he has released or transferred his claim to the defendant. This court has recognized an exception to this rule, in suits prosecuted in the name of an assignor for the benefit of an assignee of a *chose* in action. Before the statute required a certain class of such suits to be prosecuted in the name of the party really interested, courts of law, even in suits in the name of the assignor, took notice of the rights of the assignee, and would not permit them to be prejudiced by the acts, declarations, or admissions.

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sions of the assignor, done or made after the assignment.—1 Brick. Dig., 127, §§ 56–58. The assignment was given such effect, as between the parties, that thereafter the assignor could not defeat the action prosecuted in his name for the benefit of the assignee. The position of a grantee in a conveyance of land held adversely is similar to that occupied, at the common law, by an assignee of a *chose* in action. In each case, the transfer is binding between the parties, and is void only as to third persons who, according to the theory of the law, might be prejudiced by having claims against them put in the hands of others than the original holders. In each case, if the suit is against such third person, it may be prosecuted in the name of the transferrer, for the benefit of the transferee. The reasons against permitting the transferrer to defeat such suit by anything said or done by him, after the transfer, are equally applicable in each of the two cases. These reasons have led several courts, in which the question has been presented, to the conclusion that a grantor in a conveyance of land held adversely can not, by a subsequent release or conveyance to the adverse holder, or by an order to dismiss, defeat an action brought in his name for a recovery of the land from the adverse holder for the benefit of the first grantee. *Steeple v. Downing*, 60 Ind. 478; *White v. Patten*, 24 Pick. 324; *Farman v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140. This conclusion is supported by a consideration which is well illustrated in the present case. David Pearson's heirs, who executed the deed relied on by the defendant, had only such right to the land as descended to them from their ancestor. So far as the defendant claims under their deed, he stands in their shoes. He has no greater rights by virtue of that deed than his grantors had at the time it was executed. Their ancestor's prior conveyance was binding on them, in favor of his grantees. That conveyance conferred upon the grantees therein the right to use the name of the grantor, or of his heirs, in an action of ejectment against the adverse holder. Neither the grantor nor his heirs could refuse the use of their names for such a purpose. They could not confer upon another a right which they did not themselves have. The defendant's adverse possession entitles him to treat the deed to Strange and White as a nullity. But when he abandons this position, and sets up a claim under the grantor in that deed, to that extent he puts himself in privity with that grantor, and derives from him only such rights as the latter had. So far as the defendant claims under the deed to him from David Pearson's heirs, he relies on their rights as against Strange

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and White; and that deed can not have effect to defeat this suit, as the grantors therein had no right to prevent the prosecution of the suit in their names, for the benefit of their ancestor's grantees. It results from this conclusion, which, we are satisfied, is correct, that the demurrer to the replication to the defendant's special plea number 2 should have been overruled.

The authorities cited for the appellee are not against this ruling. They only assert the general rule, that in actions of ejectment, as in other forms of action, a release or transfer of his claim by the plaintiff, pending the suit, will defeat his right to recover.—*Doe, ex dem. Alexander v. Collins*, 7 Ala. 480; *Scranton v. Ballard*, 64 Ala. 402; *Jackson v. Demont*, 9 Johns. 55. Neither of the cases cited is an authority against the proposition, that a grantor in a conveyance of land held adversely can not prevent the use of his name by the grantee, in an action for the recovery of the land for the benefit of the latter. In actions of ejectment, as in other actions, which may be prosecuted in the name of one person for the benefit of another, when the facts are brought to the attention of the court, it will not shut its eyes to the rights of the person beneficially interested in the prosecution of the suit, but will protect them against the unauthorized conduct of the nominal plaintiff.—*Roden v. Murphy*, 10 Ala. 804.

For the error in sustaining the demurrer to the replication, the judgment must be reversed.

Reversed and remanded.

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Statutory Trial of the Right of Property.

1. *Warehouse receipts; not negotiable instruments.*—Section 1178 of the Code provides that "a receipt of a warehouseman, on which the words 'not negotiable' are not plainly written or stamped, may be transferred by the endorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person." *Held*, that warehouse receipts are made negotiable only in the sense that their regular transfer by endorsement has the effect of a manual delivery of the property specified in them; but are not guaranties of title, and not governed by the law-merchant,

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2. *Same; unauthorized transfer can not vest title as against real owner.* A factor, to whom cotton has been shipped for sale, having stored the same in a warehouse, and obtained receipts therefor in his own name, can not by an unauthorized transfer of the receipts, make his pledgee's title to the cotton superior to that of the true owner.

3. *Limitation of contract of pledge.*—The clause in a contract of pledge, "which cotton has been advanced upon by us to its full value," limits the operation of the pledge to the factor's actual interest in the cotton, and the transaction is not taken out of the common-law rule, which protects the owner against an unauthorized pledge by one who holds property as a factor, or agent to sell.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

The appellee, H. H. Hurt, brought an action of detinue against Phillips & Parrish, warehousemen, for the recovery of eight bales of cotton. Upon the sheriff taking possession of the said cotton, as required by the writ of detinue, the Commercial Bank of Selma interposed a claim thereto. Upon this claim the statutory trial of the right of property was instituted, and the following facts disclosed :

In 1890, the plaintiff in this suit, H. H. Hurt, had shipped to H. C. Keeble Co., commission merchant and factor at Selma, Alabama, eight bales of cotton, with the direction to hold the same until ordered to sell. H. C. Keeble Company received the cotton, deposited it in the warehouse of Phillips & Parrish, and took warehouse receipts in its name, H. C. Keeble Company. On October 16, 1890, H. C. Keeble Company borrowed from the Commercial Bank of Selma a large sum of money, and gave the bank as collateral security for said loan of money 298 warehouse receipts, among which were the eight receipts for the cotton sued for in this action. These eight receipts were issued in the name of H. C. Keeble Company and endorsed by said company. H. C. Keeble Company gave its note for the money borrowed from the bank and endorsed it as follows : "We hereby transfer two hundred and ninety-eight bales of cotton, marked, numbered and stored as shown in the warehouse receipts, which are herewith transferred and delivered, as collateral for the within note, which cotton has been advanced upon by us to its full value, and we hereby authorize the Commercial Bank of Selma to take actual possession of the same, at any time they may desire, and sell the same without notice, at public or private sale, applying the proceeds to the credit of this note.

[Signed]

H. C. KEEBLE COMPANY,
H. C. KEEBLE, Manager."

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H. C. Keeble Company failed on January 19, 1891, and on January 20, 1891, H. H. Hurt brought the action of detinue against Phillips & Parrish.

Upon the trial of the right of property between the plaintiff and the claimant, the issue was found in favor of the plaintiff. Claimant now brings this appeal. There were many exceptions reserved to the rulings of the lower court; but the opinion of this court renders it unnecessary to notice them in detail.

DAWSON & PITTS, for appellant.—The intention of the statute is to protect warehousemen against a mistaken or wrongful delivery, and to protect the holder of the receipt, for value, against latent equities and rights.—Code, § 1178; *Alabama State Bank v. Barnes*, 82 Ala. 616; *Howland et al v. Woodruff*, 60 N. Y. 73; *First National Bank v. Shaw*, 61 N. Y. 283. Warehouse receipts which are not marked “not negotiable” on their face, are negotiable, under the statute, and when endorsed by the party to whom issued, they pass the absolute title to the property mentioned therein to the endorsee.—*Whitlock v. Hay*, 58 N. Y. 487; *Voorhis v. Almstead*, 66 N. Y. 117; *Darden v. Dean*, 106 N. Y. 205; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Moore v. Kidden*, 34 Hun. (N. Y.) 534; *Pegram v. Cowan*, 10 Bosworth, (N. Y.) 505; *Price v. Wisconsin M. & F. Co.*, 43 Wis. 267, 280-81-85; *Bishop v. Fulkluth*, 68 Cal. 607. Section 1178 of the Code has been construed by this court, and it has been held that the receipts referred to, unless the words “not negotiable” are written thereon, are transferable by endorsement and delivery.—Code, §§ 1178, 1762; *Lehman, Durr & Co. v. Pritchett*, 84 Ala. 514; *Ala. State Bank v. Barnes*, 82 Ala. 615, 616; *Allen, Bethune & Co. v. Maury*, 66 Ala. 16; *Lehman, Durr & Co. v. Marshall*, 47 Ala. 376. In this case there is no evidence that the Commercial Bank had any notice that the H. C. Keeble Co. was not authorized to transfer the cotton receipts, or that any fraud was intended to be perpetrated by the H. C. Keeble Co., and, therefore, the transfer for value, as collateral security, of the cotton receipts, by the endorsement of the H. C. Keeble Co., vested the legal title and possession of the property in the Commercial Bank.—*Colebrook*, §§ 411, 412, 413, 414, and notes; *Whitlock v. Hay*, 58 N. Y. 484; *Horn v. Baker*, 8 Cal. 614; *Gibson v. Stevens*, 8 How. 384. Thus, under the foregoing authorities, cotton receipts are considered negotiable instruments, and a *bona fide* transfer of them, for valuable consideration, without notice, is

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governed by the law-merchant, and the Commercial Bank is entitled to hold the cotton against the claim of the plaintiff. The Commercial Bank is a *bona fide* purchaser without notice of the title of the appellee to the cotton sued for in this case.—*Rice v. Jones*, 71 Ala. 553; *Cleveland v. Sibert*, 81 Ala. 140; *Leigh v. Mobile & Ohio R. R. Co.*, 58 Ala. 165; *Blackburn v. Lehman, Durr & Co.*, 63 Ala. 550; Tiedeman on Com. Paper, § 289; 1 Daniel on Neg. Instr. pages 769-776. Proof of the *mala fides* alone will defeat the title of the Commercial Bank.—Story on Notes, §§ 197, 322; 4 Lawson R. & R., § 1579; *Spencer v. M. & M. R'y*, 79 Ala. 588; *Collins v. Gilbert*, 90 U. S. Rep. 757; *Welch v. Sage*, 47 N. Y. 143; *Hamilton v. Marks*, 63 Mo. 157; *Murray v. Lardner*, 2 Wallace, 110; *Minnell v. Read*, 26 Ala. 730; *Swift v. Tyson*, 16 Peters 1; *Fowler v. Brantley*, 14 Peters 319. A person is not chargeable with notice of a fact when reasonable enquiry on his part would discover its existence, unless the law casts upon him the duty of making such enquiry. This duty only arises when he has knowledge of other facts which are reasonably calculated to arouse suspicion.—*Kyle v. Ward*, 81 Ala. 121; *Shealy v. Edwards*, 75 Ala. 411; *Hodges v. Coleman*, 76 Ala. 103; *Lomax v. Le-Grand*, 60 Ala. 543; *Hopkins v. Layton*, 30 Wis. 379; *Grant v. Nat. Bank*, 97 U. S. 80; Bump on Fraud. Convey. (3d Ed.), 201.

GASTON A. ROBBINS and J. H. STEWART, *contra*.—There are three reasons why the defense interposed by the appellant can not be maintained. 1st. Because the statute does not give the mere transfer of warehouse receipts any of the elements of commercial paper except that of assignability. *Shaw v. Railroad Co.*, 101 U. S. 557; *Allen v. St. Louis Bank*, 120 U. S. 20; *Insurance Co. v. Kiger*, 103 U. S. 352. 2d. Because the indorsee took with notice that the indorser was not the true owner, and was, therefore, doing an unauthorized act.—*Bott v. McCoy*, 20 Ala. 578; *Shorter v. Frazer*, 64 Ala. 12; *Gillespie v. United Stock Yard Bank*, 137 U. S. 411. 3d. Because the parties had notice that the Keeble Company, on its own showing, held the cotton, at most, as collateral security for money advanced upon it.—*Allen v. St. Louis Bank*, 120 U. S. 20; *Insurance Co. v. Kiger*, 103 U. S. 352.

WALKER, J.—The claim of the appellant, the Commercial Bank of Selma, to the cotton involved in this suit rests upon a transfer and delivery by the H. C. Keeble Company

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of warehouse receipts therefor, as collateral security for a note made by that company to the bank. The H. C. Keeble Company was a corporation engaged in business as a cotton-factor and grocery-merchant in the city of Selma. The appellee, who was the owner of the cotton, had had it shipped to that company, with instructions not to sell it until ordered to do so. The consignee had the cotton stored in the warehouse of Phillips & Parrish, and took the warehouse receipts therefor in its own name. No advances were made to the appellee on this cotton, and there is no evidence that he authorized the consignee to store it and take the warehouse receipts in its own name, or to pledge the cotton itself, or the warehouse receipts.

Under the common law, a factor or commission-merchant has no implied authority to pledge the goods of his principal for his own use. Unless the result is controlled by some statute, the attempted pledge does not work a divestiture of the title of the principal, and the party receiving such a pledge and advancing his money acquires no right to the property as against the principal, whether he knew he was dealing with a factor or not.—*Bott v. McCoy*, 20 Ala. 578; *Voss v. Robertson*, 46 Ala. 433; *Allen v. St. Louis Bank*, 120 U. S. 20; 1 Lawson's Rights, Remedies and Practice, § 229.

In England, and in several of the States in this country, statutes have been enacted for the protection of third persons who, in good faith and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact, hold it merely as factors or agents, having been intrusted by the owners with possession of the property or of documentary evidence of title to it.—*Saltau v. Gerdau*, 119 N. Y. 380; s. c., 16 Am. St. Rep. 843; *Howland v. Woodruff*, 60 N. Y. 73; *Price v. Wisconsin Marine & Fire Ins. Co.*, 43 Wis. 267; *Mackey v. Dillinger*, 73 Pa. St. 85; *George v. Fourth Nat. Bank*, 41 Fed. Rep. 257. Decisions controlled by such statutes have no bearing upon this case, as we have no statute purporting to change the common-law rule which protects the owner against an unauthorized pledge of his property by one who, as factor or agent to sell, has been intrusted with the possession and custody of it. No statute is appealed to which could give any color to a claim that an unauthorized pledge by a factor of the property itself which was intrusted to him would have any other

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effect as against the principal than was accorded to such a transaction by the common law.

If the H. C. Keeble Company, instead of having the cotton stored in the warehouse of Phillips & Parrish, had retained possession of it until, without any authority or license from the appellee, the cotton itself was delivered to the bank in pledge to secure the payment of the note of the H. C. Keeble Company, it is plain that the bank would not have acquired any greater title to the property than that company had to confer; and the appellee would have been entitled to recover the cotton from the bank, or to hold the bank liable for its conversion. But, it is claimed that the factor, having stored the cotton in a warehouse, and obtained warehouse receipts therefor to itself, was enabled by the transfer of those receipts to confer upon the bank a claim to the cotton which must prevail against the title of the true owner. Section 1178 of the Code is relied upon as giving this effect to the transfer of warehouse receipts by the persons to whom they are issued. The clause of that section upon which this claim is based is in the following words: "The receipt of a warehouseman, on which the words 'not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person."

Sections 1175, 1177, 1178 and 1179 of the Code are based upon an act approved February 28, 1881, entitled "An act to prevent the issue of false receipts, and to punish the fraudulent transfer of property by warehousemen, wharfingers and others."—Acts of Ala., 1880–81, p. 133. In the process of codification the provisions of that statute were re-drafted and somewhat modified. But the provisions of the four sections above mentioned are all in furtherance of the main legislative purpose which was indicated in the title, and in the corresponding section of the original act. So far as warehouse receipts are concerned, the purpose of the statute is, in the first place, to prevent the issue of such receipts unless the property therein described has been actually received, and is in the possession of the person issuing the receipt. This purpose is manifested in section 1175 of the Code. The purpose, in the next place, is to give definite legal recognition to such receipts as true tokens of the possession of the property described in them; and to regulate the manner in which the holder of such a token of posses-

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sion may, by an assignment of it, convey his interest in the property described as effectually as he could by a transfer and delivery of the property itself. The provisions to this end are embodied in sections 1177, 1178 and 1179. Undoubtedly, it was the intention of the legislature to facilitate and throw safe-guards around dealings in personal property by the use of paper representatives of it. To this end the holder of a warehouse receipt is so far treated as the possessor of the property mentioned in it that his transfer of the receipt, in the mode prescribed by the statute, operates in the same manner as the direct delivery of the property itself would do. The transfer of the receipt is given effect as a symbolical delivery of possession. The statute does not undertake to make the receipt better evidence of title than the actual possession of the property itself. We can not conceive that it could have been within the contemplation of the legislature that the provisions of the statute would enable a thief, by depositing the stolen property with a warehouseman and obtaining a receipt for it in due form, to confer upon an innocent purchaser for value and in good faith a claim to the property, which would prevail against that of the true owner.

In *Collins v. Ralli*, 10 Hun, 246, it was held, that a New York statute, substantially identical with the provision above quoted, did not protect the purchasers for value and in good faith of warehouse receipts, when the possession of the cotton they represented by the person to whom they were issued had been larcenous. After quoting the statute, the court said: "The learned counsel for the defendants insist, that the provisions of this section afford them complete protection against a recovery in this action; that having purchased the cotton upon the faith of the negotiable warehouse receipts, and paid therefor full market value, this case falls within the spirit and the letter of the section. All the other sections of this act, except the last, which is unimportant, prohibit the issue of false receipts, etc., and prescribe the penalty for a violation of their provisions. The scope and object of the act, therefore, seems to be to protect the mercantile community against fraudulent practices by warehousemen, wharfingers and others, in respect to these receipts for goods stored, or represented to be stored with them. That this is the purpose is shown by the title of the act. . . . The clause 'warehouse receipts given for any goods . . . stored or deposited with any warehouseman,' means receipts given for goods so stored or deposited by any person having the title thereto, real or apparent, or authority of

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such person therefor. This section of the act proceeds upon the assumption that the receipt is so issued. Any other construction would enable warehousemen to issue receipts for goods known by them to be stolen, and so convey title to them, or even themselves to commit larceny, and by issuing receipts for the stolen property defraud the plundered owner of all title to and power of reclaiming it. Such a construction would work a change in the law hardly contemplated by the legislature when the act under consideration was passed, and yet the construction insisted upon by the defendants would accomplish precisely this result. Courts often have to look beyond the mere words of a statute in determining its meaning, and give to it such an interpretation as the mischief sought to be cured and the evident intention of the legislature indicate." The judgment in that case was affirmed by the Court of Appeals (*Collins v. Ralli*, 85 N. Y. 637); and the decision has been approved in subsequent cases.—*Hentz v. Miller*, 94 N. Y. 64; *Saltan v. Gerdau*, 119 N. Y. 380; s. c., 16 Am. St. Rep. 843.

To put it in the power of a factor to give effect to an unauthorized pledge of the property of his principal, by resorting to the device of pledging a receipt for the property instead of the property itself, would as clearly be an abridgement of the common-law rights of the owner as it would be to allow a thief, by using a receipt for the stolen property, instead of the property itself, to defeat the common-law right of the owner to reclaim the stolen property, in whosoever hands it may be found. The statute under consideration does not purport to deal with the right of the owner of personal property to recover it from the one who claims under a disposition of it which was unauthorized by the owner. The object in view being to recognize dealings in personal property by the use of certain tokens of its possession, to prevent the issue of such tokens except when the property mentioned in them has actually been received by the persons issuing them, and to regulate the transfer of the property by assignment of the token, as a substitute for actual delivery of the property; the statute was framed on the assumption that the possession of the property by the person to whom the token was issued was accompanied by ownership and a right to dispose of it, and questions presented by the assertion of a paramount claim to the property were not dealt with by the statute, but were left to be determined by existing laws governing the right of the true owner of property to follow and reclaim it in the hands of persons claiming under an unau-

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thorized disposition of it by one not the true owner, but in actual possession of it.

There is evidence in section 1178 of the Code of the absence of any intention to enable the holder of a warehouse receipt, by a transfer of it by indorsement, to confer any better claim to the property than he could if he had not stored the property with a warehouseman, but had invested the person with whom he dealt with actual possession of it. Immediately after the clause already quoted from that section, is the following provision: "But this section must not be so construed as to affect or impair the lien of a landlord on such things or property for rent or advances, or to affect or impair any lien thereon created by contract, of which notice is given by registration in the manner prescribed by law." It is not to be supposed that the legislature was more solicitous to protect the rights of lien-holders than those of the owners of the property. The assumption is that it is the owner who has had the property stored and obtained a warehouse receipt for it; and the provision just quoted simply makes it plain that he can not, by a transfer of the receipt, any more than he could by a disposition of the property, accompanied by an actual delivery of possession, affect or impair liens upon it. It is further provided in the same section, that "in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; and if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without delivery or cancellation of such receipt, or without indorsement thereon." The first of these two clauses shows that it was assumed that the receipt was issued to the rightful owner of the property. The second of them shows that it was no part of the legislative intention to make the fact that his receipt is outstanding a protection to the warehouseman against paramount claims to the property; or to displace, in the case of the issue of a warehouse receipt to another, the common-law rules governing the rights of the owner to recover his property from a stranger claiming under a disposition of it not binding on him. The apparent object of the statutory provisions in reference to warehouse receipts is to give them, for the purposes of commerce, recognition and credit as substitutes for the property described in them, and to give dealings in them the same effect as similar dealings with the property itself. We think that

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they are made negotiable only in the sense that in their passage through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. No intention is disclosed to give dealings in them any more controlling effect upon the title to the property they represent than would be given to similar dealings with the property itself. At last, they are mere tokens of possession, and not guaranties of title by the persons issuing them. The warehouseman holds himself out as the custodian, for the legal holder of the receipt, of the property mentioned in it, but he does not warrant the title of the property against the claims of strangers to the contract of storage.

This view of the statute is well supported by pertinent authorities. By the express terms of the statute which was under consideration in the case of *Insurance Co. v. Kiger*, 103 U. S. 352, the unauthorized pledge by a factor of a warehouse receipt for the property of his principal, was ineffectual as against the principal. On that ground, the owner of the property in that case was held to be entitled to recover it, the adverse claim being under a pledge by the factor of warehouse receipts for it. But, in overruling the claim of of the pledgee against the warehouseman, based upon the provisions of the statute declaring warehouse receipts issued under it negotiable by indorsement, and making the warehouseman liable to the legal holder or owner of the receipt, for the market value of the property therein described, the court said: "There is no pretense of fraud or collusion, and we think it would be a surprise to warehousemen to be told, that when they issued their receipts for property in store, they became not only responsible as custodians of the property, but guarantors of its title to the assignees of the receipts. Such a rule would make it necessary for a warehouseman, before giving a receipt, not only to ascertain whether he had the property actually in store, but whether the title of the bailor was valid and unincumbered. Certainly this could not have been in contemplation when warehouse receipts were made by statute negotiable, and to some extent evidence of ownership." In the course of the opinion, these expressions were used: "Undoubtedly the possession of the receipts was equivalent to the possession of the property." . . . "The receipt in the hands of the company represented the cotton stored by Aiken & Watt, and gave the company the same rights it would have had if the cotton, instead of the receipt, had been handed over.

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The company got by the receipt such interest in the cotton as Aiken & Watt could by their pledge convey, and that is all Boyd & Co. agreed to deliver on the return of their receipt by the lawful holder."

In noticing a Missouri statute, almost identical in its title and provisions with the original act on which the sections of the Code under consideration were based, it was said in *Allen v. St. Louis Bank*, 120 U. S. 20-35: "None of these provisions are limited or even addressed to factors or other agents authorized to sell goods of their principals, and intrusted for that purpose with the possession either of the goods, or of warehouse receipts, bills of lading, or other similar documents in which such agents are named as consignees. But their leading object is to regulate the manner and effect of transferring warehouse receipts and bills of lading by indorsement." The meaning of the later statute which was relied on in that case was not determined by the court, except to the extent of the decision that the pledgee of the warehouse receipts, without their indorsement in writing, was not entitled to its protection.

As representatives of property, bills of lading and warehouse receipts are instruments of similar character. They are dealt with as substitutes for the property itself. The assignment of a bill of lading for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more.—*Douglas v. People's Bank of Kentucky*, 86 Ky. 176; s. c., 9 Am. St. Rep., 276; *Moore v. Robinson*, 62 Ala. 537. In *Shaw v. Railroad Co.*, 101 U. S., 557, it was recognized that a statute declaring that bills of lading "shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes," should not, in the absence of language clearly evidencing such an intention, be construed as effecting such an innovation upon the common law right of the owner of property to protection against its misappropriation by others, that such misappropriation could be successfully made by the use of a symbol or representative of the property, when it would not prevail against the claim of the owner if the possession of the property itself had been acquired in a similar manner. In *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224; s. c., 20 Am. St. Rep. 566, the proposition was stated and applied, that it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its

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possession by one having a paramount title; and it was decided that the correctness of this proposition was not affected by a statute which provided that bills of lading, or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading, and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified," etc. Mitchell, J., delivering the opinion of the court, said of this statute: "It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself."

Our conclusion is, that it would be a perversion of the manifest purpose of the statute to construe it as having the effect of putting the symbol of the property upon a higher plane, as an evidence of title, than the actual possession of property it describes. The statute does not undertake to make the transfer and delivery of the symbol more than the equivalent of an actual transfer and delivery of the property itself.

Conceding that the clause in the contract of pledge, "which cotton has been advanced upon by us to its full value," does not show that the pledgor's character as a factor was recognized in the transaction, and that it was the intention of the parties to limit the operation of the pledge to the pledgor's actual interest in the cotton by reason of advances made upon it; we have then the simple case of a pledge by a factor of the property of his principal for his own use. The warehouse receipts which he obtained are to be regarded as the cotton itself which he held in the capacity of an agent to sell. We have no "Factors Act" to raise up a statutory estoppel against the owner, based upon his act in intrusting the factor with possession of the goods, or documentary evidence of ownership and right of disposal, and thereby leading innocent third persons to deal with the factor on the faith of his apparent ownership. There is nothing to take this case out of the influence of the common-law rule, which protects the owner of personal property against an unau-

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thorized pledge of it by one who held it merely as a factor or agent to sell. The original defendants, the warehousemen, having disclaimed all interest in the suit, the plaintiff was entitled to recover his cotton, and the claim of the bank, based upon the attempted pledge by the H. C. Keeble Co., presented no legal obstacle to the plaintiff's recovery.

It affirmatively appears that the appellant was not injured by the admission of evidence of the market value of the cotton prior to the date of the transfer of the warehouse receipts. That evidence was, that in September the cotton was worth $9\frac{3}{4}$ cents per pound. The undisputed evidence was, that the cotton was worth 9 cents per pound in December and January after the transfer of the warehouse receipts. The jury assessed the value of all of it at only nine cents cents per pound. This valuation was supported by the undisputed evidence, excluding the evidence of the higher value in September.

In view of the conclusion, that on the undisputed evidence the plaintiff was entitled to recover, it is unnecessary to consider the various charges given and refused.

Affirmed.

CASES
IN THE
SUPREME COURT OF ALABAMA,

NOVEMBER TERM, 1892.*

Bailey v. The State.

Indictment for Grand Larceny.

1. *Larceny from store-house; variance.*—Under an indictment in the form prescribed by law, charging larceny from a store-house (Code, § 3789; Form No. 51, p. 273), a conviction may be had on proof that the defendant stole the goods in the house, but was detected and arrested before he got out of the house with them.

FROM the City Court of Gadsden.
Tried before the Hon. JOHN H. DISQUE.

W. H. STANDIFER, for appellant, cited *Point v. State*, 37 Ala. 148; *Henry v. State*, 39 Ala. 679; *Moore v. State*, 40 Ala. 49; 35 Ala. 363; 6 Ala. 885; 94 Amer. Dec. 257, or 19 So. Car. 140; 1 Greenl. Ev. § 65; Bish. Stat. Crimes, §§ 70, 233-4, 425; 10 Amer. & Eng. Encyc. Law, 549; 12 *Ib.* 829, n. 3.

WM. L. MARTIN, Attorney-General, for the State.—The indictment is in the form prescribed, and that form has remained unchanged for nearly forty years. It was held sufficient when the statute only denounced larceny in a dwelling-house or store-house; and it would be a strange construction which would now hold it insufficient, when the statute has been accommodated to it.—*Wilson v. State*, 61 Ala. 151; *Smith v. State*, 63 Ala. 55; 3 Brick. Digest, 280, § 459.

* The first 51 of the following cases were prepared for the printer by the former reporter, Hon. J. W. Shepherd.

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STONE, C. J.—The defendant was indicted for larceny from a store-house under section 3789 of the Code of 1886. The indictment pursues the form No. 51, example 3, of that Code; and is in the following language: "The grand jury charges that, before the finding of this indictment, Sam Bailey, whose true Christian name is to the grand jury unknown otherwise than as stated, feloniously took and carried away from a store-house one shirt, of the value of seventy-five cents, the personal property of Max Long, against the peace," &c. The testimony tends to prove, and does prove, that the defendant feloniously stole the property described in a store-house; but before he escaped from the house, he was detected, the goods taken from him, and he was arrested. The only question presented by this record is, whether the proof corresponds with the allegations of the indictment, and justifies a conviction.

This statutory crime is found in the Code of 1852, section 3170. Its language, as then expressed, was, "Any person who commits the crime of larceny in any . . . store-house, . . . on conviction must be imprisoned in the penitentiary," &c. That statutory description of the offense was retained in the Code of 1867, section 3707, and in the Code of 1876, section 4359, without change except as to the manner of punishment. In each of the Codes a form of indictment for this offense was furnished, which had never been changed. See Code of 1853, form 45; Code of 1867, form 42; Code of 1876, form 39. This offense was made grand larceny by statute. During all these years, the indictments framed for this offense have pursued the language of said form, and charged the larceny to have been committed from the store-house, &c. Many convictions have been had under indictments thus framed, and have received the sanction of this court.

In the Code of 1886, section 3789, the language of the statute was changed. It was there enacted that "Any person who steals . . . any personal property of any value, . . . from or in any store-house, . . . is guilty of grand larceny, and on conviction," &c. The form, as originally framed and stated above, was retained in this Code without change.—Form 51, Example 3. It will be observed that, in that form, it was charged that the offense consisted in stealing from a store-house, and not in a store-house. One of the first cases that arose under this statute was *Point v. State*, 37 Ala. 148, in which the defendant was convicted of a felony. On review before this court, the question of variance between the alle-

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gations of the indictment and the proof was neither raised nor considered. The judgment of conviction was affirmed.

We have made very many rulings on the sufficiency of the forms of indictments furnished in the several Codes. "When the legislature, either in the body of the statute, or in a prescribed form, declares what shall be a sufficient indictment, such legislative direction is pronounced controlling, and an indictment pursuing such form will be pronounced good." *Smith v. State*, 63 Ala. 55; *McCullough v. State*, *Ib.* 75; *Wilson v. State*, 61 Ala. 151. "An indictment conforming to the form prescribed by the Code is sufficient, though matters of substance are omitted."—*Weed v. State*, 55 Ala. 13. See, also, 3 Brick. Dig. 280, § 459, where it is affirmed that "indictments in the form prescribed by the Code are sufficient, whether charging a felony or misdemeanor."—Code of 1886, § 4366.

In the Code of 1886, although the language of the statute was changed, and instead of denouncing the crime as a felony, if committed in a store-house, it substituted the words *in or from* a store-house, yet the language of the form underwent no change. It still retained only the word *from*. This, under the authorities cited above, was a legislative recognition and declaration that the form was sufficient under the amended statute. If, under the old statute, the larceny in a store-house could be proven, and a conviction had under an indictment which charged the offense was committed *from* a store-house, what argument can be made that the substitution of the words *in or from*, in the later statute, calls for a different interpretation? If the offense committed in a store-house was embraced and punishable under a charge that it was committed from a store-house, how can the fact that, under the amended statute, it might have been committed from a store-house, as the indictment charges, make it less punishable under the indictment? Is the variance between the allegations and proof any greater under the new statute, than it was under the old?

Under our statute—Code of 1886, § 4366—the forms furnished are "sufficient in all cases in which the forms there given are applicable." The form employed in this case is expressly made applicable to the crime with which the defendant was charged. The legislature expressly re-enacted the form, and made it applicable to the statute as amended. We hold that that body thereby declared it was sufficient for the new enactment, as it had previously declared it was sufficient for the older statute. And in declaring its sufficiency, we only re-affirm our uniform rulings. In thus an-

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nouncing, we are not unmindful that we run counter to some expressions found in *Moore v. State*, 40 Ala. 49; but those expressions were neither necessary, nor made a point in the decision of the case.

Affirmed.

Wiley v. The State.

Indictment for Murder.

1. *Evidence relevant to question of self-defense.*—The defendant being on trial for the murder of his wife, whom he shot with a pistol and killed on her refusal to go home with him, and having proved that she was a woman of dangerous character, and testified for himself that he wanted to take her home because she had been drinking, and that, as he approached her, she cursed him, threw her hand towards her bosom, and stepped towards him; he may further testify that she owned a pistol, and was in the habit of carrying it in her bosom, although the evidence for the prosecution showed that no weapon was found on her body, that she was standing still when shot, holding her hands down in front of her person, and that he had threatened, while trying to borrow a pistol, that he would kill her if she did not go home with him.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN R. TYSON.

W. L. PARKS, for appellant, cited *State v. Graham*, 61 Iowa, 608; *Spivey v. State*, 58 Miss. 858; 9 Amer. & Eng. Encyc. of Law, 683.

WM. L. MARTIN, Attorney-General, for the State.

McCLELLAN, J.—The appellant was indicted, tried, convicted and sentenced for life, for the murder of his wife, Dora Wiley. The killing by him was not controverted, but he relied on self-defense. The evidence for the State tended to show that, a short time before the killing, the defendant "had made several threats that he was going to kill Dora, his wife, if she did not go home and cook his supper, and said that he was going to ask her to go, and if she did not when he asked her, he would kill her; said threats were made at the time of, and after the defendant had gone to several to borrow a pistol; that defendant did borrow a pistol, and went to where deceased was, . . . and asked

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her to go home and cook his supper. Deceased refused to go, and defendant shot her with a pistol, which resulted in her instant death. That no weapon was found on the person of the deceased, and when she was shot she had a pocket handkerchief and bunch of keys, which she was holding in her hand, and that her hands were down and in front of her person, and that she was standing still when she was shot." The defendant testified in his own behalf that he borrowed the pistol, but for the purpose of shooting a dog. He denied having threatened deceased, and said that he had been threatened by her several times during the day; but admitted that he had been with her much of the time during the day, and that about a half hour before the killing he went off about a quarter of a mile and borrowed the pistol with which he shot deceased, and approached her to get her to go home with him, as she had been drinking; and that when he approached her she cursed him, and threw her hand towards her bosom, and stepped towards him, and he shot her. "Defendant also proved that deceased was a woman of dangerous character." The defendant then "proposed to prove by his own testimony, and would have shown, 'that deceased owned a pistol, and was in the habit of going armed with her pistol; that she carried it in the bosom of her dress, and defendant knew these facts.'" The court refused to admit this evidence, and an exception to this ruling presents the only point reserved for our consideration.

The action of the court was clearly erroneous. The facts proposed to be adduced directly tended to support the defendant's theory of self-defense. The deceased was a woman of dangerous character. The jury might have found, if they believed the defendant, that when he shot her she was advancing upon him in an angry and threatening manner, throwing her hand to her bosom. In connection with this evidence, which was admitted, the testimony which was excluded would have gone to show the imminency of defendant's peril of life or grievous bodily harm, considering the situation from his point of view. Her ownership of a pistol, the fact that she habitually carried it in the bosom of her dress, and the knowledge on the part of the defendant of these facts, put this evidence on the footing of an offer to prove, where a man has been killed, that the deceased threw his hand to his "pistol pocket" as he advanced upon the slayer, and it has never been doubted that such evidence is competent; it is indeed exceedingly common in murder trials. We have nothing to do with the weight of the evidence; that was a question purely for the jury, and it should

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have been submitted to them along with all the other evidence in the case.

Reversed and remanded.

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Indictment for Murder.

1. *Discharge of juror on special venire.*—In a capital case, a special venire having been summoned, the court may excuse from service as a juror a person who is a policeman on active duty; this being, within the meaning of the statute (Code, § 4335), a “reasonable or proper cause to be determined by the court.”

2. *Charge as to sufficiency of evidence.*—A charge given in a criminal case, instructing the jury that they must render a verdict of guilty, “if they believe from the evidence,” certain facts hypothetically stated, omitting the expression “beyond a reasonable doubt,” or other equivalent words, is reversible error, and it is not necessary that the defendant should ask an explanatory charge.

3. *Conspiracy; liability of each for acts of others.*—When two or more persons combine or conspire to do an unlawful act, or to commit a criminal offense, each is equally responsible for the act of the others in furtherance of their common purpose, if he is present at the time, aiding, encouraging, or ready to assist if necessary, and if the act done is within the scope of their common purpose, or is the natural and proximate consequence of the act intended; but they are not responsible for an act prompted by the individual malice of the perpetrator, and it is a question for the jury whether the act done was within the scope of the common purpose, or grew out of the individual malice of the perpetrator.

4. *Charge as to manslaughter.*—When a party is on trial for murder, it is the safer rule for the court to charge the jury as to all the degrees of homicide included in the indictment, “unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree;” but, when the evidence set out in the bill of exceptions shows that the defendant, if guilty at all, is guilty of murder, the failure of the court to charge as to the constituents of manslaughter is not error.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN R. TYSON.

The defendant in this case, Oliver Pierson, was indicted, jointly with one Will Jackson, for the murder of Robert Henderson, by shooting him with a pistol; was tried separately, convicted of murder in the second degree, and sentenced to the penitentiary for the term of ten years. The bill of exceptions purports to set out “substantially all the evidence in the case,” and shows that the parties were all

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negroes, and that the difficulty occurred on Sunday afternoon during the summer of 1892, at a country church on the railroad between Troy and Brundidge, where a camp-meeting was in progress. The evidence for the prosecution tended to show that a quarrel, or disturbance of some kind, arose between the negroes belonging to the neighborhood of the two towns; that the defendant was seen retreating before several negroes from the neighborhood of Troy, holding a pistol above his head, and threatening to shoot if they did not hold back; that Henderson, the deceased, came from the church, and attempted to quell the disturbance; that the defendant gave up his pistol to Will Jackson, or the latter claimed and took it, after some conversation between them; that the defendant picked up a base-ball bat, on the renewal of the quarrel, and threatened to strike the deceased with it, when Jackson shot and killed the deceased, after which he and Jackson ran off down the railroad. The court declines to state the evidence, and a further statement of it is not necessary to an understanding of the points decided.

In charging the jury, the bill of exceptions states, "the court defined murder in the first and second degrees, but did not define manslaughter;" but no exception was reserved to this omission. The court gave the following charge at the instance of the prosecution, and the defendant duly excepted to it: (2.) "If several persons conspire to do an unlawful act, as to commit murder, all the members of such illegal combination are responsible for the act of each other, done in prosecution of their common purpose; and in this case, if the jury believe from the evidence that the defendant was acting in concert with Will Jackson, and that it was their common purpose and design to murder Robert Henderson, and that one of them, in pursuance of this common purpose, did murder him in this county before the finding of this indictment, then the defendant would be responsible for the act of his accomplice, whether he or Jackson shot the pistol, if the evidence shows that it was done by either of them."

R. L. WILLIAMS, and W. L. PARKS, for appellant.—(1.) The court erred in excusing Cowart as a juror.—*Parsons v. State*, 22 Ala. 50; *Britton v. Stebber*, 62 Mo. 370. (2.) The second charge given at the instance of the prosecution was erroneous, because it authorized a conviction although the jury were not satisfied beyond a reasonable doubt, or to a moral certainty.—2 Amer. & Eng. Encyc. Law, 657, and notes. (3.) The charges asked, as to the liability of conspirators or ac-

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complices for the acts of each other asserted correct propositions, and ought to have been given,—*Tanner v. State*, 92 Ala. 1.

WM. L. MARTIN, Attorney-General, for the State.—(1.) The court has a discretionary power to excuse a juror, for any cause deemed “reasonable or proper.”—Code, § 4335; *Fariss v. State*, 85 Ala. 1, which overrules *Parsons v. State*, 22 Ala. 50. (2.) The doctrine of the criminal law is well settled, that, to authorize a conviction, the evidence must satisfy the jury beyond a reasonable doubt, and to a moral certainty; and the court should so instruct the jury in every case.—19 Amer. & Eng. Encyc. Law, 1079. But it is not necessary that this principle shall be enunciated in every charge given: having once been given in the oral charge of the court, or presumed to have been given in the absence of exception, it is not necessary to repeat it in every charge directed to a particular feature of the case. The second charge given at the instance of the prosecution was directed to the law of conspiracy, and asserted the law correctly on that question; and a reasonable construction of it would require the jury to find the requisite degree of proof before a conviction. If the defendant apprehended injury from it, he should have asked an explanatory charge.—*People v. Sheldon*, 68 Cal. 434. (3.) As to the law of conspiracy, see *Martin v. State*, 89 Ala. 115; *Tanner v. State*, 92 Ala. 1.

COLEMAN, J.—The defendant was tried and convicted of murder in the second degree. The first exception is to the action of the court in excusing the juror Cowart, who had been drawn and summoned on the special venire. When his name was called, he stated to the court, that he was a member of the police of the city of Troy, and on active duty, and asked to be excused from service as a juror. The court excused him, and the defendant excepted. Section 4335 of the Criminal Code is as follows: “The court may excuse from service any person summoned as a juror, if he is disqualified, or exempt, or for any other reasonable or proper cause, to be determined by the court.” We are of opinion that the excuse given by the juror Cowart, that he was a policeman of the city of Troy on active duty, was a “reasonable or proper cause” within the meaning of the statute. His duties as a policeman could not be attended to while serving as a juror. The case comes within the rule declared in *Fariss v. State*, 85 Ala. 1, and *Maxwell v. State*, 89 Ala. 150.

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In the case of *Phillips v. The State*, 68 Ala. 469, the juror claimed to be exempt from jury duty under the provisions of a special statute, and the trial court so held. This court held that the facts did not show he belonged to the class exempted by the statute. Section 4335 of the Code was not considered in that case, and the juror was not excused under its provisions.

The second exception is to the giving charge No. 2 for the prosecution. The objection to this charge is, that the jury were instructed, "if they believe from the evidence that the defendant was acting in concert with Will Jackson," &c. The precise objection is, that the degree of proof required by the charge is too low. Being a criminal trial, the law requires that the proof must satisfy the jury "beyond a reasonable doubt," to authorize a conviction. The proposition is certainly correct. A jury should not convict, unless they are satisfied from the evidence beyond a reasonable doubt of the defendant's guilt. Section 2756 of the Code declares that, "Charges moved for by either party, . . . must be given or refused in the terms in which they are written, . . . and may be taken by the jury with them on retirement." Certainly, the charge as given is not the law. It does not appear any where in the record that the court instructed the jury as to the measure of proof required in criminal cases to authorize a conviction. In the charge given, they are instructed "that, if they believe from the evidence," that is sufficient. The jury had this charge "with them on their retirement." The jury are bound by the instruction of the court. They may have believed the facts predicated in the charge, and yet have not been satisfied of their truth beyond a reasonable doubt.

There is no presumption of error without injury in a criminal case in this State. We are aware that it has been held differently in other courts, and that the giving of such a charge merely calls for an explanatory charge, to the effect that "to believe from the evidence" requires the jury "to be satisfied beyond a reasonable doubt."—*People v. Sheldon*, 68 Cal. 434, 438. We can not consent to the doctrine. If a court should charge a jury, in a civil case, that they must be satisfied beyond a reasonable doubt of any fact in dispute, this court would not hesitate to reverse; and we can not see why, "if to believe the evidence" is not error, and merely calls for an explanatory charge, "to believe beyond a reasonable doubt," in a civil case, should be error, and not held to be a mere statement of law which calls for an explanatory charge. Furthermore, we regard the rule as to giving ex-

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planatory charges applies only when the charge given asserts a correct proposition of law, but from its phraseology, or some other cause, is calculated to mislead the jury; but we can not sanction the application of the rule in cases where the charge given asserts absolutely an incorrect proposition of law. Under this doctrine, every erroneous charge given must be held to be cured by subsequently giving a correct charge. What is a jury to do, with two charges given for their guidance, which assert two propositions of law, the one instructing a conviction if they "believe the evidence," the other instructing them not to convict unless "they are satisfied beyond a reasonable doubt." We hold the court erred in giving the charge.

We are aware that, in some cases in our own courts, where the facts were not disputed, and the only question was whether, as a matter of law upon the undisputed facts, the defendant was guilty, the general charge was given to convict if the jury "believed the evidence," and no exception was taken to the charge on this account. *Green v. State*, 97 Ala. 59.

The law of conspiracy, as applicable to the facts of this case, has been so fully and clearly stated in the cases of *Martin v. The State*, 89 Ala. 115, and *Tanner v. The State*, 94 Ala. 1, we content ourselves with one extract from each case. In the first it is said, on page 119: "Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony. Nor need it be shown that there was pre-arrangement to do the specific wrong complained of. When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, encourage each other in whatever may grow out of the enterprise upon which they enter, each is responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all or less than all of the conspirators. And it is not necessary to this equal accountability that positive proof be made of the unlawful common purpose with which the enterprise was entered upon. It may be inferred from the conduct of the participants. 'All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. . . . And where persons combine to stand by one another in a breach of the

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peace, with a general resolution to resist to the death all opposers, and in the execution of their design murder is committed, all of the company are equally principals in the murder.'—1 Whar. Cr. Law, § 220. 'It should be observed, however, that while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals.'—*Ib.*, § 397. And this is the general doctrine on the subject.—*Smith v. State*, 52 Ala. 407; *Jordan v. State*, 9 Ala. 9; *Williams v. State*, 81 Ala. 1; *Amos v. State* 83 Ala. 1; 1 Bish. Cr. Law, § 649." And in *Tanner's Case*, it is said, on page 6: "And this criminal accountability extends, not alone to the enterprise, adventure, or encounter in which the conspirators are engaged, but it takes in the proximate, natural, and logical consequences of acts intentionally done; and one who is present, encouraging or ready to aid another in such conditions, must be presumed to be cognizant of that other's intention, to the extent above expressed. If such conspiracy, or community of purpose, embrace the contingency that a deadly encounter may ensue, with the common intention, express or implied, to encourage, aid, or assist, even to the taking of life, should the exigencies of the encounter lead up to that result; then, as a general rule, the act of one becomes the act of all, and the one who encourages, or stands ready to assist, is alike guilty with the one who perpetrates the violence. And such community of purpose, or conspiracy, need not be proved by positive testimony. It rarely is proved. The jury are to determine whether it exists, and the extent of it, from the conduct of the parties, and all the testimony in the cause.—*Williams v. State*, 81 Ala. 4; *Martin v. State*, 89 Ala. 115; *Gibson v. State*, *Ib.* 121." Keeping these principles in view, the trial court will have but little difficulty in forming its own charge, and in determining the correctness of charges requested by either side.

We do not think the court erred in not charging the jury of its own motion as to the constituents of manslaughter. Under the facts as disclosed in the record, the defendant was guilty of murder, or of no offense for which he could be convicted under this indictment. We do not know that the evidence will be the same on another trial, and we state that it is much the safer rule to charge upon all the degrees of homicide included in the indictment, when a party is on trial for murder, unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree.

There was evidence tending to show a preconcert, a com-

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munity of purpose, on the part of Will Jackson and the defendant, to take the life of deceased, and that defendant was present, aiding, encouraging or abetting Will Jackson, and that defendant himself entertained malice, and had the intent to take life. But it was for the jury to say what credit should be given to his evidence.

Under the facts of the case as disclosed in the record, the law is, that if Jackson entertained malice towards deceased, and had the intent to kill him, unless the defendant also on his part entertained malice, or unless he knew that Jackson entertained such malice and intent, and with knowledge or notice of such malice and intent aided, encouraged or abetted him, the defendant ought not to be convicted of murder. *Tanner's Case, supra; Jordan v. State*, 79 Ala. 9. There was evidence tending to show these conditions existed, but it was a question for the jury to say what weight should be given to this evidence. The charges requested by the defendant, which referred these questions to the jury, should have been given. We need not specify the charges, and it would not be proper to particularize the facts.

Nothing we have said contravenes or limits the rule which holds an accomplice responsible "for acts which are the direct, proximate, natural result of the common purpose or conspiracy;" but our purpose is to emphasize the fact, that the jury should say from all the evidence whether a particular act was within the scope of the common purpose, or grew out of the individual malice of the perpetrator.—*Tanner v. State, supra*.

What we have said will suffice on another trial.

Reversed and remanded.

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Indictment for Burglary.

1. *Unnecessary averments in indictment.*—In an indictment for the burglary of a dwelling-house, an averment that "goods, or clothing, things of value," were kept therein for use, sale, or deposit, is unnecessary, but, being matter of description, must be proved; and the averment is not supported by proof of the fact that a bed and a bureau were kept in the house for use, no proof of their value being adduced, or that they were of any use.

2. *Relevancy of evidence as tending to show motive.*—Under an indictment charging the burglary of a dwelling-house with intent to steal,

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the prosecution may prove, as tending to show a motive for the offense, conversation had between the owner of the house and the defendant, about a month before the burglary, which tends to show that the defendant knew or believed that money was kept in the house.

3. *Tracks or foot-prints as evidence; to what witness may testify.*—The evidence showing that, on the morning after the burglary, naked foot-prints were found on the ground pointing to and from the house occupied by the defendant, and he voluntarily making tracks near them, a witness may testify that he measured the two sets of tracks, and that they were the same.

4. *Confessions of third person as evidence.*—In a criminal case, the confessions of a third person, to the effect that he committed the offense, are not admissible as evidence for the defendant.

5. *Charges as to sufficiency of evidence and reasonable doubt.*—A charge instructing the jury, in a criminal case, "that the innocence of the defendant should be presumed until his guilt is established by evidence in all the material aspects of the case beyond a reasonable doubt and to a moral certainty;" or, "that the evidence, to find him guilty as charged, must be strong and cogent, so strong and cogent as to show his guilt to a moral certainty,"—each asserts a correct legal proposition, and its refusal is reversible error.

6. *Argumentative charge as to evidence of foot-prints.*—A charge instructing the jury, "as to foot-prints, that where no peculiar marks are observed, but the correspondence thus proved is merely in point of superficial shape, outline and dimensions, and those of the ordinary character, it may serve to confirm a conclusion established by independent evidence, but can not be in itself safely relied on, on account of the general resemblance known to exist among the feet and shoes of persons of the same age and sex," is properly refused because argumentative.

7. *Charge as to hypothesis of guilt.*—A charge instructing the jury that, "before they should convict the defendant, the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with all of them," asserts a correct legal proposition; but the jury should keep in mind the distinction between facts proved and matters given in evidence.

8. *Charges as to sufficiency of evidence in excluding probability of innocence.*—A charge which instructs the jury that the evidence in all criminal prosecutions, "to justify a conviction, should be such as to exclude a rational probability of innocence," is inapt, confusing and misleading, and is properly refused; but a charge instructing them that they "must believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to impress the minds of the jury with such belief of his guilt, they should find him not guilty,"—is correct, and ought to be given.

9. *Charge as to sufficiency of evidence.*—A charge instructing the jury that, "no matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof which the law requires,"—is correct and ought to be given.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN R. TYSON.

The indictment in this case charged that the defendant,

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a freedman, "with the intent to steal, or to commit a rape, broke into and entered the dwelling-house of James E. Moore, in which goods or clothing, things of value, were kept for use, sale or deposit." On the trial, said James E. Moore testified, on behalf of the prosecution, that his dwelling-house was broken into and entered one night in June, 1892; that the house consisted of two rooms, which were separated by an open hall, or passage-way; that his wife aroused him in the middle of the night, screaming, and saying that some one was in the room; and that he then heard some one run out through the hall. Mrs. Moore testified that, while lying in bed awake, she heard her puppy whining in the other room, as if at the approach of some one, and then heard some one walking lightly over the floor, and "working at the handles of the bureau;" that he then came into the room where she and her husband were in bed, approached the bed, and "peered down at her," but did not touch her; that she then screamed and aroused her husband, and that she recognized the defendant as the intruder. Mrs. Moore further testified that, "about a month or more before the burglary," the defendant came to the house, and wanted to borrow two or three dollars; that she told him she had no money, and he replied, "if he had as much money as she had, he would not want to work any more." The defendant objected to this evidence, "on the ground that it was illegal, irrelevant, and too remote;" and he excepted to its admission. Jas. E. Moore testified, also, that on the morning after the burglary, he found tracks made by a naked foot, running up to his house, across a plowed field, from the defendant's cabin, and returning to it by a circuitous route; that when the defendant came for his mule in the morning, to begin plowing, he asked him to pull off his shoes and make tracks near the others, and defendant did so without objection; that he measured the tracks, and found that they corresponded with the others in length and breadth, and that there were no peculiarities about any of the tracks. This testimony was admitted without objection, but afterwards, when one Everett, another witness for the prosecution, testified to his measurement of the tracks and their correspondence in length and breadth, the defendant objected and excepted to the admission of his testimony, on the ground that it was the mere expression of an opinion, and the witness was not shown to be an expert. A witness for the defendant testified that he saw one Allen Cooper coming from the direction of Moore's house, about 12 o'clock the night of the burglary; and Moore had testified that said Cooper and

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the defendant lived on the same place, and wore "about the same size of shoes." The defendant offered to prove by two witnesses that said Cooper confessed to them, about two months after the burglary, that he committed it. The court excluded this evidence, and the defendant excepted.

The defendant requested the following charges in writing, and duly excepted to their refusal: (1.) "The jury in this case have nothing to do with the existence of Jesus Christ, or the manner in which his existence could be proved, but must try the case on the facts." (2.) "There is no evidence in the case of the existence of Jesus Christ, the jury are not trying any such issue, the pert allusions of the prosecuting attorney are not evidence, and they can not have the slightest weight in the case." (3.) "The evidence against the defendant is partly circumstantial, and his innocence should be presumed by the jury until his guilt is established by evidence in all the material aspects of the case beyond a reasonable doubt, and to a moral certainty." (6.) "The evidence against the defendant is partly circumstantial, and his innocence must be presumed by the jury, until the case against him is proved in all its material circumstances beyond a reasonable doubt; to find him guilty as charged, the evidence must be strong and cogent, and unless it is so strong and cogent as to show his guilt to a moral certainty, the jury must find him not guilty." (8.) "As to foot-prints: Where no peculiar marks are observed, but the correspondence thus proved is merely in point of superficial shape, outline and dimensions, and those of the ordinary character, it may serve to confirm a conclusion established by independent evidence, but can not be in itself safely relied on, on account of the general resemblance known to exist among the feet and shoes of persons of the same age and sex." (10.) "Before the jury should convict the defendant, the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with all of them." (12.) "In criminal prosecutions, to justify a conviction, the evidence should be such as to exclude a rational probability of innocence." (13.) "The humane provision of the law is, that there should not be a conviction upon the evidence unless to a moral certainty it excludes every other reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the acts, then the guilt of the accused is not shown by that full measure of proof which the law requires." (14.) "The only foundation for a verdict of guilty in this case is, that the entire

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jury shall believe from the evidence, beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to impress the minds of the jury with such belief of his guilt, they should find him not guilty." (15.) "The evidence in this case is not sufficient for the jury to find that the defendant entered the house with the intent to commit a rape." (16.) "If the jury believe the evidence, they will find the defendant not guilty." (17.) "Under the evidence in the case, the jury should not find that the defendant entered the house with intent to commit a rape." (20.) "There is no evidence before the jury that there were any goods or clothing, things of value, kept in the house for use, sale or deposit; and unless they are satisfied from the evidence beyond a reasonable doubt, and to a reasonable certainty, that the defendant entered the house with the intent to commit a rape, they should find him not guilty."

R. L. WILLIAMS, and W. L. PARKS, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

HEAD, J.—The indictment, which is for burglary of a dwelling-house, contains the unnecessary averment that "goods or clothing, things of value," were kept in the house for use, sale or deposit. This averment is clearly one descriptive of the house, and though unnecessary to be alleged, yet, being alleged, it became necessary for the State to prove it. There could be no conviction without such proof. Our adjudications are all one way on this point.—*Lindsay v. State*, 19 Ala. 560; *Smith v. Causey*, 28 Ala. 655; *Johnson v. State*, 35 Ala. 363, and later cases to same effect. Under the evidence, the jury might have found that there was a bed and bureau in the house, kept for use, but there is no proof that they were of value. There being a total failure of proof of this averment, the defendant was entitled to the general affirmative charge which he requested.

The conversation had by defendant with Mrs. Moore, about a month before the alleged burglary, in reference to borrowing money, tended to show that defendant knew or believed there was money in house, and, therefore, tended to show motive for the alleged burglary. It was properly admitted in evidence.

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The statement of the witness Everett, that he saw the defendant's track, when made by him in Moore's yard, on the morning after the alleged burglary, and measured it, and also measured the length and breadth of the tracks made the night before in the yard, and that they measured the same, was the statement of a collective fact, under our rulings, and admissible.

The inadmissibility of the fact proposed by defendant to be proved by the witnesses Joe and Laura Baxton, that one Allen Cooper had confessed to the commission of this crime, is so palpable as not to require discussion.

We do not care to comment on charges 1 and 2 requested by defendant. Their subject-matter was not involved in, and had nothing to do with, the cause. The court was under no duty to instruct the jury on any such subject.

It is a well settled proposition, that the innocence of the accused is presumed until his guilt is established by evidence, in all the material aspects of the case, beyond a reasonable doubt, and to a moral certainty; and it may also be stated that the evidence of guilt must be "strong and cogent," and that unless it is so strong and cogent as to show the defendant's guilt to a moral certainty he should be acquitted. These are the propositions of charges 3 and 5 requested by defendant, and they should have been given. *Salm v. State*, 89 Ala. 56. The record shows that the evidence against the accused was partly circumstantial, and these charges were not impaired by the assertion therein of that fact.

The 8th charge requested by defendant was purely an argument, and was properly refused.

The hypothesis of guilt, in order to justify conviction, should flow naturally from, and be consistent with, all the facts proved in the cause; and charge 10, so declaring, ought to have been given. The distinction must be kept in mind, however, between *facts proved*, and matters given in evidence. There may be many matters testified to in a cause which are not facts proved. The latter are those which the jury find are established as facts upon a consideration and comparison of all the evidence. These are what the charge in question refers to as "facts proved."

Charge 12 is inapt. A probability of the existence of a thing or condition means that there is more evidence in favor of such existence than against it. The term implies consideration of probative facts. In criminal accusations and trials, there are, to start with, no "*probabilities*" of innocence. There is a presumption of innocence, which is

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conclusive until it is overthrown by evidence. It is true, that after evidence of guilt has been introduced, a probability of innocence, or an overbalancing weight of evidence in favor of innocence, which is the same thing, may arise by the introduction, by the defendant, of countervailing proof; and before there should be a conviction, this probability or weight of evidence should be removed by further evidence of guilt sufficient, with all the evidence in the case, to satisfy the minds of the jury of such guilt beyond a reasonable doubt; and it would not be improper to charge that, if such a probability has arisen, it must have been removed before there can be a conviction. Thus, advertng to charge 14 requested by defendant, it is not improper to instruct, as therein is done, that there must be, as essential to conviction, an exclusion of every probability of innocence and every reasonable doubt of guilt. But, formulated as a general proposition, as in charge 12, "that in all criminal prosecutions, the evidence must be such as to exclude a *rational probability* of innocence," is inapt, confusing and misleading. There are many charges of this nature found in the reports of our criminal trials, drawn, as in this case, without due consideration of the meaning and bearing of terms used, which, if sanction is given to them, tend to bring the law into confusion, rather than to make it certain. All such ought to be set aside, though technically they may assert correct legal propositions.

Charge 13, requested by defendant seems to come squarely up to the principle announced in *Ex parte Acree*, 63 Ala. 234, and should have been given.

Charge 14 ought to have been given. We do not construe it to mean that, if all the evidence in the case is sufficient to convict, there should be no conviction because a sufficiency of it was not introduced by the prosecutor. If the whole evidence establishes the guilt, whether introduced by the State or the defendant, then a sufficiency of proof has been furnished by the prosecutor, within the meaning of this charge.

We have carefully read the evidence, and do not think there is any tending to show that the breaking and entering were done with intent to commit rape. We do not know what may appear on another trial, on this point, but in the condition of the present record, charges 15 and 17 ought to have been given.

Charge 20 is disposed of, by what we have said in reference to those unnecessary averments of the indictment.

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For the errors mentioned, the judgment is reversed, and the cause remanded.

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Indictment for Larceny of Calf.

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1. *General charge on evidence.*—In a criminal case, when there is any conflict in the evidence, or different inferences may be drawn from it as to the defendant's intent whether honest or criminal, in the commission of the act charged, he is not entitled to the general charge on the evidence.

FROM the Circuit Court of Bullock.

Tried before the Hon. JESSE M. CARMICHAEL.

The defendant in this case was indicted for the larceny of "bull yearling," the property of Jeff. Furman. On the trial, the evidence showed that the defendant caught the yearling, one day in February, within two hundred yards of Furman's house, and drove it along the public road to his own house, about two miles distant; that he kept it in a pen near the public road for about two weeks, and then killed it. Furman identified the animal as his by the hide, and the defendant claimed it as his own, having strayed from his premises before Christmas. A witness for the State, who had helped the defendant catch the yearling, testified that the defendant said at the time, "If this is my calf, it has grown mightily, and the spots are much larger;" and further, that the defendant asked two girls, whom they met in the road, if they knew any body in that neighborhood who had lost a calf. The defendant introduced evidence tending to show that the calf was the one which he had lost, but it is unnecessary to set out the evidence at length. The defendant asked the court to charge the jury that, if they believed the evidence, they must acquit him; and he excepted to the refusal of this charge.

NORMAN & SON, for the appellant, cited *Johnson v. State*, 3 Ala. 523; *Green v. State*, 68 Ala. 539; *Rountree v. State*, 3 Ala. 381; 2 East's P. C. 659.

W. L. MARTIN, Attorney-General, for the State.

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HARALSON, J.—The question of the intent with which the defendant took and carried away the yearling, was not free from doubt, and was one of inference from the evidence, proper to be determined by the jury. There were conflicts in the evidence,—some tending to establish the case for the State,—and different inferences, as to the intent of the defendant in taking the animal, may be reasonably drawn from it. In such a case, the general charge in favor of the defendant, was properly refused.—*Johnson v. The State*, 73 Ala. 523; *Bromley v. Birmingham Min. R. R. Co.*, 95 Ala. 397; 11 So. Rep. 341.

Affirmed.

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Indictment for Felonious Adultery.

1. *Charge ignoring evidence of lewd character*—A man being on trial under an indictment for living in adultery with a woman, and evidence of her lewd character having been admitted without objection, a charge instructing the jury that “the fact that she has a bad character for virtue does not aid the prosecution, unless it has otherwise proved his guilt as charged in the indictment,” is properly refused.

2. *Charge on part of evidence*.—A charge which, specifying one of several criminating circumstances in evidence, instructs the jury that it is not enough to justify a conviction, is properly refused, since it tends to mislead, and is to some extent argumentative.

FROM the Circuit Court of Barbour.

Tried before the Hon. JESSE M. CARMICHEL.

The defendant in this case, Dick Cox, a negro man, was indicted jointly with Dura Gratehouse, a white woman, for living together in a state of adultery or fornication; was tried separately, convicted, and sentenced to the penitentiary for the term of four years. On the trial, he asked two charges in writing, and excepted to their refusal. The exception as reserved, and the first charge, are stated in the opinion of the court. The second charge was in these words: “The fact, if it be a fact, that the defendant was seen in and about the house of the said Dura Gratehouse, is not enough to convict them of the offense of adultery; the State must go further, and prove the offense of adultery.”

Wm. L. MARTIN, Attorney-General, for the State.

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STONE, C. J.—Two written charges were asked by defendant; and, proceeding, the bill of exceptions employs language: "Which charges the court refused to give. the refusing of said charges the defendant, Richard Cox, generally excepted." Can we safely construe this language meaning that defendant reserved a separate exception to refusal of the court to give each of the two charges requested?—3 Brick Dig. 80, §§ 34, 37, 41.

But we need not decide this case on this question. Neither the charges asked should have been given. The first reads thus: "The fact, if it be a fact, that D. G., [the female with whom defendant was charged to have lived in adultery] of a bad character for virtue, does not aid the State, unless he has otherwise proved his guilt as charged in the indictment." One recital in the bill of exceptions is as follows: "The evidence for the State further tended to show that D. G. was a woman of lewd character." This testimony had been introduced without objection, so far as the record informs us. If this charge had been given, it would have been a practical denial of all criminating inference to be drawn from the testimony of her character for lewdness. This, because it instructed the jury to ignore that testimony, unless the State had otherwise proved defendant's guilt. If his guilt had been otherwise proved beyond the degree of certainty required in criminal cases, then the testimony of her bad character could have had no effect of operation, and no purpose to accomplish. A charge, which ignores the probative force of testimony which is before the jury without objection, is rightly refused.—3 Brick Dig. 111, § 83.

The other charge is equally faulty. It mentions only one of the criminating circumstances testified to, and asks the jury to find that that is not enough to justify a conviction. It entirely ignores other testimony which was much more damaging in its tendencies than that mentioned. It was the duty of the jury to weigh all the testimony *pro* and *con*, and from its combined effect to make up their verdict. Such a charge tends to mislead, and is to some extent an argument. It was rightly refused.—3 Brick Dig. 111, §§ 73, 75, 79, 83; 112, § 87; *Smith v. State*, 88 Ala. 73. Affirmed.

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Wait v. The State.*Indictment for Burglary.*

1. *Outhouse within curtilage of dwelling-house.*—A conviction may be had for burglary (Code, § 3786) in breaking and entering, with intent to steal, a smoke-house in which meat, corn, &c., is kept for family use, and in which meat is sometimes smoked, although it is distant from the dwelling-house about forty yards, and is not inclosed by the same fence. On these facts, if the court can not, as matter of law, hold that the building is within the curtilage of the dwelling-house, the jury may so find as matter of fact.

FROM the Circuit Court of St. Clair.

Tried before the Hon. LEROY F. BOX.

M. M. SMITH, for appellant.

WM. L. MARTIN, Attorney-General, for the State, cited 1 Whart. Crim. Law, §§ 781-83; *Ivey v. State*, 61 Ala. 58; *Washington v. State*, 82 Ala. 31; *Cook v. State*, 83 Ala. 62; 3 Amer. St. Rep. 688; 31 Maine, 523; 24 Ark. 44; 81 Amer. Dec. 60, n. 67.

McCLELLAN, J.—The appellant was indicted, tried and convicted on a charge of breaking into and entering, with intent to steal, “a smoke-house, a building within the curtilage of the dwelling-house of Mrs. Varina Inzer, in which merchandize, meat, provisions, things of value, were kept for use, sale or deposit, &c.; the indictment being drawn under section 3786 of the Code, which declares the breaking and entering, with intent to steal, any “dwelling-house, or any building, structure, or inclosure within the curtilage of a dwelling-house, though not forming a part thereof,” burglary. The evidence as to the character of the house broken into and its connection with the dwelling-house was to the effect, that it was the smoke-house of Mrs. Inzer; that she had no other smoke-house, and that her supply of meat was in this house when it was broken into, and she kept it there for use. The building was about forty yards from the dwelling-house, and not within the same inclosure as the dwelling-house; that it had at one time been used by Mrs. Inzer’s husband “as a doctor shop,” but for the last two or three years she

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had used it for the purpose of keeping her meat, corn, cotton-seed and other plunder stored. "There was a partition in the building, and in one end she kept her corn and cotton-seed, and in the other end she kept her meat and some plunder; and the end of the building where her meat was kept was where the alleged breaking was done. There was a door in said partition, and meat had been smoked in said building."

The only question presented for our consideration arises on the refusal of the trial court to give five several charges requested by the defendant, each one of which asserts, or proceeds on the theory, that there was no evidence in the case tending to show that the building broken and entered was a smoke-house "within the curtilage" of Mrs. Inzer's dwelling-house. A "smoke-house" is defined to be "a building in which meats or fish are cured by smoking; also, one in which smoked meats are stored."—Century Dictionary, 5719. And this definition is aptly illustrated by a quotation from Irving: "I recollected the *smoke-house*, an outbuilding appended to all Virginian establishments for the smoking of hams and other kinds of meats." The term in common parlance, we feel safe in saying, embraces any out-building, appended to a dwelling, in which the family supply of meat is habitually kept and stored for use, and where meat may be smoked when necessary. Certainly the evidence here tends, at least, to show that the house broken into was of this character. It is equally clear, we think, that the jury had a right to conclude from the uses of this smoke-house as an appendage of the dwelling, and its propinquity thereto, that it was within the curtilage thereof, notwithstanding it was not within the same inclosure.—*Cook v. State*, 83 Ala. 62.

These considerations will suffice to justify the action of the trial court in refusing each of the charges requested by the defendant. We may add that, on the evidence adduced, we should be much inclined to hold, *as matter of law*, the facts being undisputed, that the house broken into was within the curtilage of Mrs. Inzer's dwelling, if the question was presented in that form.

Affirmed.

[Hooks v. The State.]

Hooks v. The State.*Indictment for Murder.*

1. *Charge as to sufficiency of evidence.*—To authorize a conviction in a criminal case, the evidence must convince the jury *beyond a reasonable doubt*; and a charge which instructs them that they can not acquit the defendant, "if they believe the evidence," is reversible error.

2. *Homicide by husband; adultery of wife as provocation.*—If the husband detects his wife in the act of adultery, and immediately slays her or her paramour, the law does not entirely justify or excuse him, but holds the provocation sufficient, as matter of law, to reduce the killing to manslaughter; and if he detects them, not in the act of adultery, but in a compromising position under suspicious circumstances, and kills one or both of them, it is a question for the jury whether the provocation was sufficient to reduce the grade of the offense, and whether he acted under the heat of sudden passion thereby excited, as in other cases of homicide under the heat of passion excited by great provocation.

FROM the Circuit Court of Elmore.

Tried before the Hon. N. D. DENSON.

The defendant in this case, Thornton Hooks, a freedman, was indicted for the murder of Willis Thorman, another freedman, by shooting him with a gun, or, as alleged in the the second count, by cutting him with a razor; was convicted of murder in the second degree, and sentenced to the penitentiary for the term of twelve years. The difficulty between the parties, as the evidence adduced on the trial showed, commenced at the defendant's house, or in his yard, early one morning in August, 1892, the deceased being badly cut with a razor, and the defendant receiving serious injuries; and the deceased having then left the premises, and walked off some 250 yards, the defendant followed him, and shot him while leaning against a stump, exhausted from loss of blood. The deceased died, from the effects of the wounds, on the afternoon of the same day. His statements, which were admitted in evidence as dying declarations, were to the effect, "that the defendant cut and shot him for nothing;" that he stopped at defendant's house to deliver a message to his wife, and only interfered to prevent him from beating her. The defendant testified in his own behalf, that after leaving home that morning, and looking back, he saw the deceased stop at the house, and go in with his wife; that he at once returned, and, looking through the window of the room, saw

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them behind the door attempting to commit an act of adultery. On this evidence, the court charged the jury, "If the jury believe all the evidence, they can not acquit the defendant." The defendant excepted to this charge, and also to the refusal of each of the following charges, which were asked by him in writing: (1.) "If the jury believe from the evidence that the defendant saw his wife and the deceased in such position one to the other as to lead a reasonably prudent man to believe that they were about to commit the act of adultery, and thereupon entered into a combat with the deceased, and before a sufficient time had elapsed for his passion, aroused by such provocation, had time to cool [?] he killed the deceased; then the law tenderly regards a homicide thus committed, and makes it only manslaughter." (2.) "If the jury find from the evidence that the conduct of the deceased, at the time the defendant entered into combat with him, was such as would provoke the defendant; then, in estimating the degree of provocation, the jury may look to the fact, if they find from the evidence that it is a fact, that the combat was had at the defendant's house." (3.) "If the jury believe from the evidence that the defendant entered into combat with the deceased to prevent him from committing adultery with his wife, and that when he inflicted the wound which produced the death, the provocation was so recent and so strong that he could not be considered the master of his own understanding,—then the defendant would be guiltless."

WM. L. MARTIN, Attorney-General, for the State, cited Wharton's Amer. Crim. Law, § 459; 9 Am. & Eng. Encyc. Law, 585, note 1.

COLEMAN, J.—The defendant was convicted of murder in the second degree. The exceptions reserved arise from a charge given at the request of the prosecution, and the refusal to charge as requested by the defendant. The charge given for the prosecution was as follows: "If the jury believe all the evidence, they can not acquit the defendant." This charge instructs the jury, in effect, that if they believe the evidence, the defendant must be convicted of some offense. The defendant reserved an exception to the giving of this charge. The jury are not required, under this charge, to believe the evidence beyond a reasonable doubt. It is made sufficient for conviction, if they only believe the evidence. Prosecuting attorneys should be careful, in the preparation of charges, that plain principles of law are not violated; and

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the courts should closely scan the phraseology of charges requested. That the proof must satisfy the jury of the defendant's guilt beyond a reasonable doubt, before they are authorized to convict, is an "ancient landmark," and one which should be preserved and always recognized.—*Green v. State*, 97 Ala. 59; *Pierson v. State*, ante p. 148.

Where one person detects another in the act of adultery with his wife, and immediately slays the adulterer or his wife, as matter of law the provocation is sufficient to reduce the killing to manslaughter. The law does not declare that any thing less than actual sexual intercourse is a sufficient provocation, as a matter of law, to reduce the offense from murder to manslaughter. It may be that the detection of another, under circumstances such as testified to by the plaintiff, may provoke and engender passion to such a degree as to overthrow reason, and if, under the influence of passion thus aroused, he immediately attack the offending party and slay him, before cooling-time has intervened, not from malice or unlawful formed design, but from such passion thus provoked, the offense may be manslaughter. Whether the party acted under the influence of such a passion, and whether the provocation was sufficient, and whether there had been "cooling-time," are questions of fact to be determined by the jury. The principle we announce is, that the law does not declare the provocation sufficient, unless the parties are detected in the act; but a jury may say whether the compromising position of the parties was sufficient to arouse passion in the husband to such a degree as to overthrow reason, just as a jury may say in some other cases whether the offense was the result of sudden and sufficient provocation to reduce the offense from murder to manslaughter. Charge one, requested by the defendant and refused, was faulty, in that it assumed, as matter of law, that the provocation was sufficient. It should have been left to the jury to say, from the evidence, whether the provocation was sufficient, and whether he acted under the influence of sudden heat of passion, thus engendered, and before cooling-time took the life of the deceased.

There was no error in refusing the 2d and 3d charges requested by the defendant. There is no law, unless made so by statute, which wholly excuses the husband from liability for taking the life of the wife or her paramour, although he slay them or either while in the act of adultery. The 3d charge asserts a contrary principle. The 2d charge is argumentative, confused and misleading, and was properly refused.

Reversed and remanded.

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Indictment for Burglary and Grand Larceny.

1. *Defendant testifying for himself; cross-examining and impeaching.* When the defendant in a criminal case elects to testify in his own behalf (Code, § 4473), he is subject to cross-examination like any other witness, and may be impeached by proof of contradictory statements previously made by him; and this principle extends to declarations or statements which have been excluded as evidence when offered as confessions, because not shown to have been made voluntarily.

2. *Possession of stolen goods; variance.*—The defendant being charged with the larceny of four ten-dollar gold coins, the prosecution may prove that, when arrested, the day after the larceny, he had in his possession a five-dollar coin, and that he handed to a companion a bag containing a ten-dollar coin and ten silver dollars, there being also evidence from which the jury might infer that this money was procured in exchange or barter for that stolen.

3. *Same; abstract charge.*—A charge instructing the jury that “the mere possession of stolen goods, without other evidence of guilt, is not *prima facie* evidence of burglary,” is properly refused because abstract, when there is other evidence tending to show the defendant’s guilt as charged.

4. *Same; charge invading province of jury.*—A charge instructing the jury that, “the money found on the defendant’s person not being the money alleged to have been stolen, he is not required to account to the satisfaction of the jury for his possession of the money found on him at the time of his arrest,” is properly refused, because invasive of the province of the jury, when there is evidence from which they may infer that some of the money was part of that stolen, and some of it procured in exchange or barter of the rest, and also other evidence of guilt.

FROM the Circuit Court of Blount.

Tried before the Hon. JOHN B. TALLY.

The indictment in this case charged, that Lit Hicks and Arthur Hale, with intent to steal, broke into and entered the dwelling-house of Mose Carter, and feloniously took and carried away four ten-dollar gold coins, the property of said Carter. A severance having been granted, Hicks was tried alone, was found guilty, and sentenced to the penitentiary for the term of four years. On the trial, Mose Carter testified, that the burglary was committed one Sunday night in September, 1892; that he went to his house on the afternoon of that day, in company with the defendant, and, having occasion to change his clothes, showed the defendant his money, which consisted of four ten-dollar gold coins;

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that the defendant saw him put the money in a bag, which he placed in a box, put the box in his trunk, and locked it; that they left the house together, and when he returned the next morning he found the door open, the trunk broken open, and the money missing; that he reported the facts to the authorities at Walnut Grove, a few miles distant, and procured a warrant of arrest for the defendant and said Arthur Hale, who had gone from Walnut Grove in the direction of Guntersville. The evidence showed that the officers with the warrant of arrest, Herron and Phillips by name, overtook the defendant, in company with one Laughter and another, several miles from Walnut Grove, and ordered them to throw up their hands; that the defendant, "when he saw the officers coming, and about the time he was ordered to throw up his hands, put his hand in his pocket, took out a small bag, and handed it to Laughter, saying, 'Hold this for me';" that the bag contained one ten-dollar gold piece, and ten silver dollars; and that a five-dollar gold coin, with some small change, was found in the defendant's pocket when he was searched. The prosecution proved, also, that the defendant and Arthur Hale were seen going towards the house of Mose Carter on the night the burglary was committed; that on the morning of the arrest, before the officers overtook the defendant, he stopped at two houses on the road and asked to buy some small things, showing his money, and saying that he had made it by trading watches; and that he said to his companions, on the morning after the burglary, "say nothing about my carrying so much money." The State then introduced said Herron as a witness, one of the officers who made the arrest, and offered to prove by him a confession alleged to have been made to him by the defendant while under arrest, during the only conversation had between them; but the court excluded this evidence, on the ground that the confession was not shown to have been voluntarily made. The defendant then testified as a witness in his own behalf, admitting his possession of the money and the bag as above stated, and explaining how he had procured the money,—some of it at cards, some by swapping watches, and some by work done; and he denied that he was in the neighborhood of Mose Carter's house on the night of the burglary.

"On cross-examination of the defendant, the prosecution proceeded to lay a predicate for the purpose of impeaching him, by repeating to him the statements which he had made to Herron while under arrest, and asking him if he made such statements. In answer to these questions, the de-

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endant denied that he had made some of the alleged statements, and admitted that he had made others, but said he was induced to make them. After the defendant had closed his evidence, the prosecution recalled said Herron, and asked him to state what the defendant had said to him in the conversation between them while defendant was under arrest. The defendant objected to the witness testifying as to anything said by defendant in said conversation, because the court had held it inadmissible as evidence, when offered as a confession, and because the same was illegal, irrelevant, and immaterial." The court overruled the objection, and allowed the witness to testify to the defendant's confessions to him, to the effect that he watched while Arthur Hale forced open the door of the house with an axe, and that he afterwards broke open the trunk. The defendant objected and excepted to the admission of this evidence.

After the evidence was closed, the above being the substance of it, the defendant moved the court to exclude from the jury all that was said about the money found in the defendant's possession when he was arrested, and the money in the bag handed to Laughter, on the ground that it was not identified as the money charged to have been stolen; and he excepted to the overruling of his motion.

The defendant requested the following charges in writing, and duly excepted to their refusal: (1.) "The mere possession of stolen goods, without other evidence of guilt, is not *prima facie* evidence of burglary." (2.) "The money found on the defendant's person when arrested not being the money alleged to have been stolen, he is not required to account to the satisfaction of the jury for his possession of the money found on him at the time of his arrest."

WM. L. MARTIN, Attorney-General, for the State, cited *Clarke v. State*, 78 Ala. 474; 87 Ala. 71; *Norris v. State*, 87 Ala. 85; *Cotton v. State*, 87 Ala. 103; *Rains v. State*, 88 Ala. 91; *Mitchell v. State*, 94 Ala. 68; *Com. v. Tolliver*, 119 Mass. 312; *Mulachi v. State*, 89 Ala. 134; 1 Greenl. Ev., § 34.

HEAD, J.—The question whether the accused, who makes himself a witness in his own behalf, under the statute authorizing him so to do, is subject to impeachment, as other witnesses, by the introduction by the State, upon the proper predicate therefor, of evidence of contradictory statements previously made by him, is not an open one. The following authorities settle that he is subject to such impeachment: *Clarke v. State*, 78 Ala. 474; 87 Ala. 71; *Norris*

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v. State, 87 Ala. 85; *Cotton v. State*, 1*b.* 103; *Rains v. State*, 88 Ala. 91; *Mitchell v. State*, 94 Ala. 68.

There was no error in the refusal of the court to exclude the evidence that a five-dollar gold-piece was found in defendant's pocket at the time of the arrest, and that defendant handed to Albert Laughter ten silver dollars at or about that time. While these pieces of money were not the stolen coins, yet, in connection with the other evidence, his possession of them and his conduct with reference to the silver dollars were circumstances proper to be considered by the jury, who might, under all the facts and circumstances shown in evidence, have legitimately inferred that he had exchanged the stolen coins, or some of them, for those found in his possession. For the greater reason, was there no error in the motion to exclude the evidence that he handed to Laughter a ten-dollar gold-piece at or about the time of the arrest. The stolen coins consisted of four ten-dollar gold-pieces.

The first charge requested by defendant was abstract. This is not a case dependent for conviction upon mere evidence of possession by the accused of the stolen property. There was other evidence tending to prove the defendant's guilt of the burglary and larceny. The charge requested was, therefore, improper.

The second charge requested was also improper. It assumes that none of the money found in defendant's possession was part of the stolen money. It was for the jury to say whether the ten-dollar gold coin he had was one of those stolen. Moreover, there was other evidence in the case besides the bare possession of the money, which had to be considered in determining whether defendant should satisfactorily account for that possession, and these were considerations for the jury. The charge clearly invaded the province of the jury.

There is no error in the record, and the judgment is affirmed.

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Indictment for Betting at "Craps."

1. *Sufficiency of indictment.*—A form of indictment for betting at a game played with cards, dice, or some device or substitute for cards or dice, being now prescribed by statute (Code, § 4057; Form No. 16, p. 267), it is sufficient to follow that form, and it is not necessary to aver that the game was played.

2. *Proof of playing and betting by other persons.*—Since the defendant could not bet with himself on the game, it is proper, if not necessary for the prosecution to prove that other persons present played and bet on it.

3. *Refreshing recollection of witness by memorandum.*—While it may not be permissible for the solicitor, during the examination of a witness, "to read from a memorandum of his testimony before the grand jury," he may "ask questions from the memorandum to refresh the memory of the witness as to his testimony before the grand jury."

4. *Argumentative and abstract charges* are properly refused; and also a charge which is based, not on the belief of the jury as to the tendencies of the evidence, but on what the evidence shows, or fails to show.

5. *Proof of betting by defendant.*—Where one witness testifies that he saw the defendant and others playing and betting at a game of "craps," but does not state what was bet, and another, who was present at the time, testifies that the players "would all get down on their knees in a circle, put up the money, and throw the dice; that he saw defendant down on his knees, but does not recollect positively that he saw him put up any money, or shoot the dice, but his best recollection is that he did play,"—the jury may infer that the defendant bet money on the game.

6. *What is public house.*—A dwelling-house may become a public house within the statutes against gaming, if several persons are in the habit of going to it frequently for the purpose of playing cards or "craps," although at one time the killing of a negro there "broke off the playing to some extent."

FROM the Criminal Court of Pike.

Tried before the Hon. WM. H. PARKS.

The indictment in this case charged that the defendant, Frank Thompson, "bet at a game played with cards, or dice, or some device or substitute for cards or dice, in a public house, highway, or some other public place, or at an out-house where people resort." There was a demurrer to the indictment, "because it does not allege that any game was in fact played;" but the demurrer was overruled, and issue was joined on the plea of not guilty. The opinion states most of the evidence ad-

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duced on the trial, and the exceptions reserved by the defendant. The playing and betting to which the witnesses testified, and in which the defendant was charged with participating, took place at the house of one Stegars, during Christmas week, 1891; and the witnesses further testified that they, with others, frequently went to the house of said Stegars, sometimes by invitation, and sometimes without, for the purpose of playing cards, or "shooting craps," and generally paid a small sum to the wife of said Stegars; that a negro, one Love, was killed there, or in that neighborhood, some time during the summer of 1891, and this killing "broke up the playing to some extent." On this evidence, the defendant asked the following charge, and excepted to its refusal: (2.) "Stegars' house may have been a public house before the 'Love shooting,' but, if it is shown by the evidence that for some cause people stopped going there to play, and the evidence fails to show that any game had been played there for several months prior to the game at which the defendant is said to have played, they must find the defendant not guilty."

R. L. HARMON, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

HARALSON, J.—1. Before the Code of 1886, went into effect, we held, that it was necessary to aver in the indictment, that the game at which the betting was alleged to have been done *was played*. *Smith v. The State*, 63 Ala. 55; *Johnson v. The State*, 75 Ala. 7; *Dreyfus v. The State*, 83 Ala. 54; *Tolbert v. The State*, 87 Ala. 27. The present Code, under which this indictment appears, prescribes a form which had not before existed. The indictment in this case follows this form strictly, and is in all respects sufficient.—*Rosson v. The State*, 92 Ala. 77; *Darby v. The State*, in Mss.

2. The witness, Carter, for the State testified, that he saw the defendant bet at a game called "craps," at the dwelling-house of Edmund Stegars, on the last Monday before Christmas in 1891, and that there were several other persons there who played the same game and bet on it. The solicitor then asked the witness, whether the other persons there that day played at the same game and bet on it. This question asked the witness to state again, the same thing which he had just stated, without objection on the part of defendant. The defendant objected to the

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question, on the ground that it was illegal and irrelevant, in that, whether other persons played or bet in the game then played was no evidence that the defendant bet or played. The question and answer were allowed, and the court committed no error therein. There could be no conviction as charged without betting, and there could be no betting without playing, and some one or more persons with whom to play and bet. The defendant could not play or bet with himself. It was necessary, therefore, to show these facts with others in order to show defendant's guilt.

3. The solicitor, on the examination of the witness, was proceeding to read from a memorandum of the witness' testimony before the grand jury, when an objection to his doing so was made by defendant, and sustained by the court. The bill of exceptions states, that "the solicitor was then permitted to ask questions from the memorandum to refresh the witness as to his testimony before the grand jury, and the defendant duly excepted." In what manner the solicitor asked questions from the memorandum, for the purpose stated, and in what the objection to his doing so consisted, does not appear. A witness may refresh his memory by a memorandum made at or about the time to which it relates, when he knows it to be correct, and after refreshing his memory, can testify from independent recollection.—*Stoudenmire v. Harper*, 81 Ala. 242; *Acklen v. Hickman*, 63 Ala. 494. And a party may, for the purpose of refreshing the memory of his own witness, when put to a disadvantage by an unexpected answer, or when the witness fails to answer as was expected of him, ask him if he had not, at a certain time and place, made certain statements, even if they are inconsistent with his testimony just given.—*White v. The State*, 7 Ala. 24; *Griffith v. The State*, 90 Ala. 583. The witness had just stated, that he did not remember how many times he had been to Edmund Stegars' house, within twelve months before he saw defendant play and bet, and had seen "craps" played there; but, after the questions propounded by the solicitor, from the memorandum referred to, he stated, that his memory was refreshed, and he had seen craps played at said Stegars' house as many as four or five times within the time specified. There was no error in allowing the witness to be refreshed in his memory in the manner objected to. *Billingslea v. The State*, 85 Ala. 325.

4. There was no error in refusing to give charge No. 2, asked by defendant. It was argumentative and abstract, and, if not otherwise vicious, was properly refused on these grounds. The witness, Carter, testified, "that he had seen

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craps played at Stegars' house as many as four or five times during the twelve months prior to the game in which the defendant was charged to have played; and witness, Wiley, for the State, testified, "that he had seen dice or craps played there as many as three or four times, during the twelve months preceding the game above mentioned, but that he did not have any recollection of seeing more than one or two games played there, during a period of about six months next before the game above mentioned," for betting at which, defendant was being tried. The charge is predicated, not upon the belief of the tendencies of this evidence; but it is based on what the evidence shows or fails to show, without reference to the jury's belief of the evidence.

5. The defendant asked the court to give the general charge, which was properly refused. The ground on which this charge was requested is based on the supposed absence of proof showing that the defendant bet any money, bank-notes, or other thing of value. This was necessary to have been shown, to the satisfaction of the jury.—*Chambers v. The State*, 77 Ala. 80; *Dreyfus v. The State*, 83 Ala. 54. The first of the witnesses examined proved the playing and betting by defendant, but he does not state what he bet. The other witness stated, that on the day he saw defendant at Stegars' house,—the occasion selected by the State,—there were a good many there, engaged in crap-shooting; "that when they would shoot craps, they would all get in a circle or ring, and get down on their knees, and put the money up and throw the dice. He saw defendant down on his knees, but did not recollect, positively, that he saw him put any money up, or shoot the dice, but that his best recollection was, that he did play." This evidence afforded ground for inference, and tended to show that the defendant did bet money at the game played.

6. The evidence in the cause tended to show that the dwelling-house of Stegars, where the game was played, was a public house in the meaning of the statute, and was proper for the consideration of the jury.—*Downey v. The State*, 90 Ala. 644; *Jacobson v. The State*, 55 Ala. 151; *Coleman v. The State*, 20 Ala. 30.

Affirmed.

[Bradley v. The State.]

Bradley v. The State.*Indictment for Selling Liquor Unlawfully.*

1. *Local prohibitory law; constitutional provisions affecting title and subject-matter.*—A local prohibitory law being entitled “An act to prohibit the sale, giving away or disposing of any spirituous, vinous or malt liquors, or intoxicating bitters, beverages or drinks, or fruits preserved in alcohol or alcoholic liquors,” within the specified territory; a provision for refunding the amount paid on licenses for the current year, and appropriating money out of the public treasury for that purpose, is outside of the subject-matter expressed in the title, and is, therefore, unconstitutional and void; but a conviction may, nevertheless, be had under the punitive provisions of the statute, which are separate and distinct from the unconstitutional provision.

FROM the Circuit Court of Crenshaw.

Tried before the Hon. JOHN P. HUBBARD.

The statute under which the defendant in this case was indicted and convicted was the act approved February 28th, 1887, entitled “An act to prohibit the sale, giving away or disposing of any spirituous, vinous or malt liquors, or intoxicating bitters, beverages or drinks, or fruits preserved in alcohol or alcoholic liquors,” within certain prescribed limits.—Sess. Acts 1886-7, p. 665. The opinion states the material facts.

GAMBLE & BRICKEN, and A. A. WILEY, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

STONE, C. J.—Defendant was indicted under the act approved February 28, 1887—Sess. Acts, 665—an omnibus, local prohibition law. Its provisions, as applicable to this case, are, that “Any person who sells, gives away, or otherwise disposes of any spirituous, vinous or malt liquors,” &c. . . . “within townships 11 and 12 of beats 1 and 2, Crenshaw county, . . . must, on conviction, be fined not less than fifty dollars, and may also be sentenced to hard labor for the county, for not less than thirty days, nor more than three months.” The second count of the indictment in this case strictly conforms to the statute.

All the provisions of section 1 of said statute are embraced within the title to the enactment. Section 3 has pro-

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visions that are not covered by the title, viz., it provides for refunding to persons who have theretofore obtained licenses to retail liquors within the prohibition areas three-fourths of the several amounts paid by them in procuring their licenses. It also contained an appropriation clause of moneys to meet such payments.

The defendant was tried and convicted under the second count of the indictment. There was a demurrer to this count, alleging that the third section of the act, under which the trial was being had, made the act unconstitutional, in this, that it introduced a subject which was not expressed in the title, nor included within the purview of its terms. Const. Art. IV, § 2. We think that section does bring into the enactment a subject that can not be held to be embraced within the title. The question then arises, does this vitiate the whole statute?

We have frequently considered this provision of the Constitution. In *Ballentyne v. Wickersham*, 75 Ala. 533, we summarized most of the principles decided by this court. Those provisions are, that this provision of the Constitution is mandatory; that the title of a bill may be very general, and need not specify every clause of a statute, it being sufficient if they are all referable and cognate to the subject expressed; but, if clauses are contained in the act, which are not so correlated to the subject expressed in the title, as to appear to follow as a natural and legitimate complement, they can not stand. A statute embracing two subjects, both of which are expressed in the title, falls within the inhibition, and the whole statute is unconstitutional and void.

In *Powell v. State*, 69 Ala. 10, a case presenting the question we now have in hand, we said: "If they [the two clauses] are perfectly distinct and separable, and are not dependent, the one on the other, the courts will permit the one part to stand, though the other may be expunged as unconstitutional, provided effect can thus be given to the legislative intent."

Lowndes Co. v. Hunter, 49 Ala. 507, presented the constitutional question we are considering, on an issue not distinguishable in principle from the one now under consideration. In that case we gave effect to the clause that was expressed in the title, notwithstanding the other clause was without the purview of the title to the act. See, also, *Rogers v. Torbut*, 58 Ala. 523; *Ex parte Cowert*, 92 Ala. 94.

We hold that the punitive clause of this statute can be upheld without a reference to the other clause, and hence

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affirm the judgment of the Circuit Court in overruling the demurrer to the indictment.

There is nothing in any of the other questions raised. The proof fully justified a conviction of the defendant. *Segars v. State*, 88 Ala. 144; *Mays v. State*, 89 Ala. 37.

The judgment of the Circuit Court is affirmed.

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Indictment for Selling or Giving Liquor to Minor.

1. *Charge on evidence.*—A charge given in a criminal case, instructing the jury that they must find the defendant guilty, "if they believe the evidence," omitting the expression "beyond a reasonable doubt," or other equivalent words, is reversible error.

2. *Selling or giving liquor to minor; negativing consent of parent or guardian.*—In an indictment for selling or giving liquor to a minor, (Code, § 4038), it is not necessary to negative either the consent of the parent or guardian or the prescription of a physician; but, when the indictment contains these averments, it is the safer practice to prove them.

FROM the Circuit Court of Dale.

Tried before the Hon. JESSE M. CARMICHAEL.

WM. L. MARTIN, Attorney-General, for the State.

McCLELLAN, J.—The indictment charges that the defendant, "a person other than the parent, or guardian, or person having the management and control of Albert Smith, a minor, did sell or give spirituous, vinous or malt liquors to Albert Smith, a minor, without the consent of the parent, or guardian, or person having the management and control of said Albert Smith, a minor, and not upon the prescription of a physician," &c. The only evidence adduced on the trial was that of said Albert Smith, who testified, in effect, that within twelve months before the finding of the indictment, the defendant, in Dale county, gave him whiskey, and that at that time he, the witness, was only eighteen years of age. Upon this, the court, at the request of the solicitor, in writing, charged the jury that, "if they believed the evidence," they must find the defendant guilty. This charge was erroneous. It authorized and required a verdict of guilty, if the jury believed the evidence, though they may

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not have believed it beyond a reasonable doubt.—*Pierson v. State*, ante p. 148.

It was not necessary for the indictment in this case to negative the consent of the minor's parent, guardian, &c., or to aver that the gift of the liquor was not made on the prescription of a physician: these are matters of defense, the burden of proving which is upon the defendant.—*Atkins v. State*, 60 Ala. 45. But these unnecessary averments being in the indictment, it would, to say the least, be the safer course to prove them on another trial.—*Gilmore v. State*, ante p. 154. See, also, *McGehee v. State*, 52 Ala. 224.

Reversed and remanded.

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Indictment for Murder.

1. *Proof of venue.*—In a criminal case, when the bill of exceptions purports to set out all the evidence, and does not show that the venue was proved, the defendant is entitled to the general charge on the evidence, and its refusal is reversible error.

2. *Dying declarations as evidence.*—To authorize the admission of statements by the deceased as dying declarations, it is not enough to show that he died very soon afterwards, but it must appear that he was conscious of his condition, though no particular form of words is necessary; and where the declarations, as in this case, are merely expressive of great pain, requesting that a doctor be sent for, and saying that he could not stand it much longer unless relieved, they are not admissible.

FROM the Circuit Court of Geneva.

Tried before the Hon. JESSE M. CARMICHAEL.

The defendants in this case, James J. Justice and Henry W. Elliott, were jointly indicted and tried for the murder of Judge Williams, by striking him with a fence-rail, were each convicted of murder in the second degree, and sentenced to the penitentiary for the term of ten years. The opinion states the points reserved by the bill of exceptions, and the material facts connected with them.

T. M. ESPY, and R. H. WALKER, for appellants.—(1.) The defendants were entitled to the general charge on the evidence, because the venue was not proved.—*Bowdon v. State*, 91 Ala. 61; *Childs v. State*, 55 Ala. 28; *Frank v. State*, 40 Ala. 9; *Clark v. State*, 46 Ala. 307; *Sparks v. State*, 59 Ala.

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; *Gooden v. State*, 55 Ala. 178; *Bain v. State*, 61 Ala. 75.
) The dying declarations ought not to have been admit-
 1.—*Pulliam v. State*, 88 Ala. 1; *Hammil v. State*, 90 Ala.
 7; *Young v. State*, 95 Ala. 5.

WM. L. MARTIN, Attorney-General, for the State.

COLEMAN, J.—The defendants were convicted of murder in the second degree. The second charge requested by the defendants was, "that if the jury believe the evidence in this case, they must find the defendants not guilty." The bill of exceptions purports to set out all the evidence. We have looked carefully through the bill of exceptions, and although there is a mass of evidence set out, the venue of the offense is nowhere proven, nor any evidence from which the venue could be legally inferred. When this is the condition of the evidence, the defendant may take advantage of the omission by a request for a general affirmative charge. This has been the rule too long now to depart from it.—*Hubbard v. State*, 72 Ala. 164, and authorities cited. The precise question has been often decided.—*Childs v. State*, 55 Ala. 28.

As the case must be reversed, and the defendants retried, we feel it our duty to consider another question; and that relates to the admission of the dying declarations of the deceased. On account of the character of this kind of evidence, the rule requires that it be received with very great caution, and that the primary facts upon which its admissibility depends should be closely scrutinized; and although this is not an indispensable pre-requisite that deceased should use so many words express his conviction that he was *in extremis*—that death was impending—that there was no hope of life—yet the judicial mind should be clearly satisfied, after careful consideration of all the circumstances, that, at the time the declarations were made, such was the conviction in the mind of the defendant. Such is the strict rule required by the decisions of this court.—*Kilgore v. State*, 74 Ala. 1; *Ward v. State*, 78 Ala. 441; *Hussey v. State*, 87 Ala. 1; *Young v. State*, 95 Ala. 5; *Hammil v. State*, 90 Ala. 577. The fact that deceased, at the time the declarations were made, was *in extremis*, and that death soon followed, are properly considered; but these facts, however clearly proven, do not alone determine their admissibility. Was declarant convinced that such was his condition? The court must determine this question, and upon it depends their admissibility. This is no part of the province of the jury. When

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they have been admitted by the court as evidence, the jury considers and determines their weight and credibility in connection with the other evidence, just as if the deceased had testified to the same facts from the stand in their presence; but the jury can not consider the credibility of the primary facts upon which their admissibility depended. This is the exclusive province of the court. Many of the charges were requested under a misapprehension of this rule of law.

To show the condition of mind of the deceased, it was proved that his death was caused by a blow on the side of the head, from which he died in a few hours; that within less than a half hour, after stating the circumstances of the difficulty, giving the names of the defendants as the guilty parties, and the instrument with which he was stricken, and which statements were admitted in evidence against the objection of the defendants, the deceased used the following expressions, as testified to, indicative of the condition of his mind: "He was hurt bad, was beat to death;" "my head is killing me;" "run and tell Jim to bring the doctor, my head is killing me;" "my head is killing me." After saying this, he begged to send for the doctor. He complained of being "bad off." "Get the doctor quick, or he couldn't stand it." "He said his head was broke; his head was about to kill him, it hurt him so bad." "After saying his head was killing him, he told his brother to go after the doctor; that he wanted the doctor." "There is where Henry struck me, and he's nearly killed me." "The Justice boys have killed me, or very near it." "They stopped me on the road, and nearly about killed me." "The Justice boys stopped me over on the road, and beat me and nearly about to death." We have stated substantially all that was said by the deceased, and the declarations as to his convictions of impending death. The evidence is fairly conclusive, that these declarations were made from a quarter to half an hour prior to the time before he told them to go for the doctor. Applying the rule that we have declared, that the primary facts should be closely scrutinized and carefully considered, and that such testimony must be received with great caution, and is to be rejected unless clearly satisfactory to the judicial mind, we are of opinion they were improperly admitted. They evince great physical suffering; a fear, perhaps, that the result would be fatal. There was no direct expression to the effect that he expected and was convinced that such would be the effect of the blow. The expressions, they had "about killed me," "nearly about beat me to death,"

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and the subsequent request that they "get the doctor quick, or he couldn't stand it," tend to show that he was not convinced that death was certain or impending. As was said in *Young v. State*, 95 Ala. 5, "A just and salutary administration of the law requires that courts should have due regard to the rules and limitations placed upon declarations made by a person in the absence of the defendant against whom they are offered, and in regard to which he has had no opportunity to cross-examine declarant."

What we have said will probably be sufficient to guide the court upon another trial.

Reversed and remanded.

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Prosecution for Carrying Concealed Weapons.

1. *Weapons found on search of person under arrest.*—Whether a conviction may be had for carrying concealed weapons (Code, § 3775), on evidence showing that a pistol was found concealed on the defendant's person by a person who assisted in searching him while in custody under an illegal arrest, is not decided, because it does not appear that the arrest was in fact illegal, and a part of the evidence objected to was legal.

FROM the County Court of Geneva.
Tried before the Hon. JERE MERRITT.

JOHN A. RAGLAND, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

HEAD, J.—State's witness, Joe Davis, testified that he saw defendant with a pistol concealed about his person; "that he discovered it while he was assisting the constable in making an arrest on the defendant's person;" that defendant gave one of his pistols to the constable, on demand made by constable; that the constable had no warrant for the arrest of defendant, but arrested him for a violation of section 3757 of the Criminal Code of 1886, and found a pistol in his pocket. We have copied substantially the language of the witness, as disclosed by the bill of exceptions. The defendant moved to exclude all the above testimony, on the

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ground that the pistol was discovered by said witness while making or assisting in making an unlawful arrest, and excepted to the overruling of the motion. The fact that the concealed pistol was discovered by the witness whilst he was assisting the constable in making an unlawful arrest of the defendant, did not necessarily render the testimony of the witness inadmissible. We presume the objection is based upon the proposition, that the discovery of the guilt was brought about by the unlawful exercise of official authority and power on the part of the constable, and that it would be against public policy, if not an invasion of a constitutional immunity of the citizen, to suffer information so obtained to be used against the defendant. This case does not call for any decision on that subject; and we declare no rule touching the admissibility of information so obtained. We refer to *Chastang v. State*, 83 Ala. 29; *Terry v. State*, 90 Ala. 635; *Scott v. State*, 94 Ala. 80, and *French v. State*, 94 Ala. 93. In the first place, it does not appear that the arrest was unlawful. An officer may arrest a person, without warrant, for any public offense committed in his presence.—Code, § 4262. For aught that appears, this arrest was of that character. In the second place, it may well be inferred from this witness' testimony, that the discovery of the concealed pistol by the witness had no relation to any act done by the constable in or about making the arrest. The fact, as shown by at least a distinct part of the testimony objected to, was simply that the discovery occurred while the witness was assisting in making the arrest. The motion to exclude went to the whole testimony. If any part of it was admissible, the motion was properly overruled. Such was the case here.

There was, also, a general motion to exclude all the testimony of the witnesses, Ed and Jesse White, and the bill of exceptions shows that the testimony of Ed White is not set out. We can not, therefore, pass upon its admissibility. The motion was general, including that as well as the testimony of Jesse White.

There is no error in the record, and the judgment is affirmed.

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Scire Facias against Bail, or Forfeited Recognizance.

1. *Description of case in judgment nisi and sci. fa.*—In proceedings against bail on a forfeited recognizance, great particularity is not required, and technical objections for want of form are not available, if the particular case is made to appear to the court (Code, § 4331); and where the name of the case is correctly stated in the judgment *nisi* and the *scire facias*, followed by the words "*Indictment for burglary*," it is not necessary that they should recite, as a fact, that an indictment for burglary has been found.

2. *Correspondence of commitment and indictment in description of offense.*—When the defendant was bound over to answer an indictment for "burglary and grand larceny," and an indictment is found against him for either or both of those offenses, his bail are equally bound for his appearance.

3. *Order for bail after transfer of defendant for safe-keeping to another county.*—When the custody of the defendant, after commitment but before indictment found, is transferred to another county for safe-keeping, and he there makes application for bail, the order admitting him to bail is properly indorsed on the cap-warrant annexed to the sheriff's return, and, if it requires the bail-bond to be "payable and conditioned as required by law," it sufficiently shows that he is required to appear at the proper court of the county in which he was committed, although it does not specify the name of the particular court or county.

4. *Same.*—In such case, the order admitting to bail is properly addressed and given to the sheriff who has the defendant in his custody, and bail is to be taken by him, although it binds the defendant to appear and answer an indictment in the county in which he was committed.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

"The defendant Holcombe, with other co-defendants, was committed by a magistrate to the jail of Marshall county, on a charge of burglary and grand larceny. Their commitment was formal and regular, but the magistrate failed to indorse on the *mittimus* the amount of bail required of the defendants. The jail of Marshall being an unsafe place for the confinement of defendants, they were duly transferred to the jail of the county of Madison. While there imprisoned, on the 4th of April, 1890, the defendant, Richard Holcombe, through another, sued out a writ of *habeas corpus* before Hon. H. C. SPEAKE, judge of the 8th judicial circuit, against Robert E. Murphy, the sheriff and jailor of Madison county, the object of which was to have his bail fixed, that he might

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give it, and be enlarged. The sheriff made his return, and attached thereto a copy of the *mittimus* of the committing magistrate, in Marshall county, as the cause of his detention of defendant. On the hearing of the application, the judge made the following order: 'It appearing to my satisfaction, that the offense with which the said Richard Holcombe is charged is bailable, and the said Richard Holcombe having waived an examination into the facts, it is ordered, that the said Richard Holcombe be admitted to bail, on executing a bond in the sum of one thousand dollars, payable and conditioned as required by law, with security to be approved by the sheriff of Madison county, Alabama.'

"Pursuant to this order, and on the same day it was made, the defendant was admitted to bail by said sheriff, on his entering into a bail-bond in the sum prescribed, with defendants, W. P. Newman and M. C. Baldridge as sureties, conditioned, that 'said Richard Holcombe should appear at the next term of the Circuit Court of Marshall county, Alabama, and from term to term thereafter, until discharged by law, to answer a prosecution pending in said court against him for burglary and grand larceny.'

"The sheriff returned the bail-bond, and all the papers in the *habeas corpus* case, to the circuit clerk of Marshall county before the first day of the next succeeding fall term of the Circuit Court of said county, for 1890; at which term, the grand jury of said county and court, returned two bills of indictment against said Holcombe, one for burglary and the other for grand larceny, being for the same offenses for which he was charged and bound over by said committing magistrate, and to answer which, he gave said undertaking in bail to the sheriff of Madison county. The said Richard Holcombe failed to appear at that term of the said Circuit Court, and a judgment *nisi* was rendered against him and his said sureties on said bail-bond, in the indictment for burglary; and at a succeeding term, the same, after due notice, was made final."

"The defendants made separate motions, each based on the same grounds, (1) to set aside the judgment *nisi*; (2) to dismiss the *scire facias*; and (3) to quash the recognizance of bail; and on the same grounds on which they based said motions, they also demurred to said judgment *nisi*."

BROWN & STREET, for appellants.

WM. L. MARTIN, Attorney-General, for the State.

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HARALSON, J.—I. The first ground urged against the judgment *nisi* and *scire facias* is, that they do not show that any indictment had been found against the defendant, Holcombe. But, this objection is technical, and not meritorious. The judgment *nisi* and *scire facias* are each headed, *The State v. Richard Holcombe, et al.* Indictment for burglary." Great particularity is not required in such proceedings, and the legislature has taken care to provide against technical defenses of this character, to such undertakings. The essence of all undertakings of bail is the appearance of defendant at court, and the bail is forfeited by the failure of defendant to appear, although the offense, judgment or other matter is incorrectly described therein, the particular matter or case to which the undertaking is applicable, is made to appear to the court.—Code, § 4431; *Lanna's Case*, 60 Ala. 100; *Vassar's Case*, 32 Ala. 586; *Elred's Case*, 31 Ala. 393.

II. For the same reasons, objections 2-5 can not be sustained. They proceed upon the idea, that because the defendant was bound over to answer an indictment for "burglary and grand larceny," therefore, if the indictment was for either, or both, separately, and not jointly, the bail-bond is not applicable to such a finding of the grand jury. The section of the Code, to which we have above referred, as was held by this court, in *Gresham's Case*, 48 Ala. 627, must be taken to apply to cases in which the indictment embraces or includes the particular offense mentioned in the undertaking of bail; as an indictment for manslaughter, in an undertaking of bail for murder; or, as here, for burglary, in one for burglary and grand larceny. The indictment, in proper case, might have included both, or either.—*Bell & Murray's Case*, 48 Ala. 694.

III. The 6th-8th and 12th grounds question the authority of the judge who ordered the sheriff of Madison county to take bail, and the competency of the sheriff to take it, in obedience to such order. The judge had the defendant before him on *habeas corpus*, for the purpose, as is manifest, of fixing his bail, which the magistrate who committed him, neglected to do. In all cases coming before a judge on *habeas corpus*, if it is found the applicant has committed no offense, he is discharged; but, if it is ascertained he has committed one, and it is bailable, he must be admitted to bail, on offering sufficient bail; or, the amount required, must be indorsed on the warrant, as well as the court to which he is required to appear, and he may be afterwards discharged by the sheriff of the county, on giving bail, in

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the amount so required.—Code, § 4782. Here, the judge, as is shown, indorsed his order upon the copy of the *mittimus*, which was made an exhibit to the petition. It is objected, he did not indorse it on the warrant. That is the very paper he did indorse it on,—the warrant of the sheriff to detain him, the *mittimus*,—for the original never accompanies the writ, or the return of the sheriff to the writ of *habeas corpus*, but a copy of it. The jailer keeps the original.—Code, § 4775. Besides, the requirement is merely directory.—*Calahan's Case*, 60 Ala. 65; *Merrill's Case*, 46 Ala. 82.

The order prescribed the amount of bail—\$1,000—and, in substance, prescribed the court to which the defendant should make his appearance. The order was, that defendant, Holcombe, be admitted to bail, in the sum prescribed, “payable and conditioned as required by law, with securities to be approved,” &c. The *mittimus*, under which he was held, a copy of which, as has been stated, was attached to the writ of *habeas corpus*, under which the judge was proceeding to fix bail, made known the court to which he was bound to appear, and the order was indorsed on that paper. The order, and the warrant or *mittimus* on which it was written, went together to the sheriff, as one paper. He had no difficulty, nor did the defendant, in understanding from the two, to which court he was to be bound over. That section of the Code, 4782, was, therefore, substantially complied with, in all that was done.

IV. But, it is objected, that the order ought to have been given to the sheriff of Marshall, to the Circuit Court of which county the defendant was bound to appear, and not to the sheriff of Madison. It was with the sheriff of Madison, however, and not of Marshall, the judge was dealing. He had no authority, by virtue of the proceeding before him, over the latter, but he had over the former.—*Dunbar v. Frazer*, 78 Ala. 529. If the judge had refused bail, his action was subject to review by this court. Section 4413 of the Code provides, that when an application of the kind is refused in vacation, the evidence may be set out on exceptions, and application made thereon to the Supreme Court. And, if the Supreme Court grants the bail, its order must fix the amount required, and direct the same to be taken by the chancellor or judge to whom the primary application was made, or by the sheriff of the county in which the defendant is confined.—Code, § 4414. If, therefore, bail had been refused by the judge, and his action had been reviewed by this court, and bail allowed, we would, in such case, have ordered the sheriff of Madison to take the bail. Such an

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order would be, to require that to be done, which, in the first instance, ought to have been done, and which the judge erroneously refused to do, clearly showing that the sheriff of Madison, who had the custody of defendant, was the proper officer to be ordered to take the bail.

V. The criticism on the bail-bond, that it is imperfect, and, therefore, invalid, because the words, "the offense of," do not appear in the bond, as they do in the form laid down in the Code, before the word, *burglary*,—making it read, "to answer for the offense of burglary," instead of, "for burglary"—can not be sustained. What is the difference in the undertaking with or without these words? Who was misled by their omission? The word *burglary*, *ex vi termini*, imports an offense.

What we have said is sufficient to dispose of all the other objections raised by defendants. There is no error in the record, and the judgment must be affirmed.

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Prosecution for Selling Liquor Unlawfully.

1. *Charges as to reasonable doubt and sufficiency of evidence.*—A charge requested in a criminal case, instructing the jury that they must acquit the defendant, unless the evidence satisfies them of his guilt "beyond a reasonable doubt and a moral certainty," is properly refused.

2. *Argumentive charges* are properly refused.

3. *Abstract charges* are properly refused; and a charge requested is abstract, when it is partly based on facts, hypothetically stated, of which there is no evidence whatever.

4. *What constitutes sale of liquor.*—A witness for the prosecution having testified that, on being told by a friend "where he could find something to drink," he went into the defendant's barber-shop, passed him standing in the door, found a bottle of whiskey in a box, put it in his pocket and carried it away, leaving a half-dollar on the chair; the jury may infer from these facts that a sale of the liquor was intended and consummated, though nothing was said between the parties, and the defendant did not see the witness take the bottle. But there could be no sale without the defendant's knowledge and consent, express or implied; and if he neither saw the witness take the bottle, nor knew that he took it and left the money for it, his subsequent use of the money in buying another bottle of liquor would not make him guilty.

FROM the County Court of Shelby.
Tried before the HON. JOHN LEEPER.

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On the trial of this case, as the bill of exceptions states, the prosecution introduced one Baldwin as a witness, who testified that he was in Columbiana one day, during the period covered by the indictment, and, meeting one Sammons on the street, asked him "if he knew where he could find something to drink;" that Sammons told him "there was something in a box in Roberson's [defendant's] barber-shop;" that he at once went to the shop, passed the defendant at the door, who was standing with his face to the street, walked up to the box, took a bottle from it, placed it in his pocket, and walked out, having put a half-dollar in the barber's chair; that defendant said nothing to him as he came in, and did not look around at him, but said, as he passed out, "I don't know what I will have to do with you," to which he (witness) made no reply. He further testified that he, with Sammons and others, walked out of the town, and drank the contents of the bottle, which was labelled "Plantation Bitters;" that the bottle was not quite full, and that they did not agree as to the character of the liquor—whether it was whiskey or some kind of bitters. Sammons, another witness for the prosecution, testified as to the company drinking the contents of the bottle, and discussing the character of the liquor. The defendant then testified for himself, that when Baldwin entered his shop, early in the morning on the day mentioned, he was standing in the door looking out into the street; that Baldwin walked by rapidly, and immediately came out again, but said nothing; that he did not look back to see what Baldwin was doing, and did not know what he was doing; that he went back to the box after Baldwin left, intending to take a drink out of the bottle, and, not finding it in the box, "came to the conclusion that Baldwin had taken it;" that, on looking around, he found a half-dollar lying on his chair; that he took the money, and went to the store of one McLean, from whom he had bought the bottle, and with it bought another bottle of the same bitters; that the bottle contained "Plantation Bitters," and he had taken one drink out of it before breakfast; "and that he had never at any time sold, given or otherwise disposed of any spirituous, vinous or malt liquors to said Baldwin."

This being "all the evidence in the case," the defendant asked the court to give the general charge in his favor, and excepted to its refusal. In his closing argument to the jury, the solicitor having said, "Consider how many widows and orphans are made by the illegal sale and hellish traffic in whiskey," the defendant asked a charge in these words:

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(2.) "No matter how many widows and orphans the illegal sale of whiskey makes, and how hellish the traffic is, it is the duty of the jury to find the defendant not guilty, unless the evidence convinces them beyond a reasonable doubt and a moral certainty that he sold, gave away, or otherwise disposed of liquor to said Baldwin." The court refused to give this charge, and the defendant excepted; and he also excepted to the refusal of each of the following charges, which were asked by him in writing: (3.) "If the jury believe from the evidence that the defendant had in a box in his shop a bottle marked Plantation Bitters, which he had obtained from McLean, and that the bottle contained rye whiskey, but that defendant had no knowledge of its being whiskey, and bought it for bitters, and that Baldwin got said bottle,—then they must find defendant not guilty." (4.) "If the jury believe from the evidence that Baldwin went into the defendant's barber-shop, and got out of a box a bottle marked Plantation Bitters, and threw a half-dollar in the chair, and that defendant was then standing in the door facing the street, and did not see said Baldwin get the bottle, then they must find him not guilty." (5.) "If the jury believe from the evidence that the defendant had in a box in his shop a bottle of whiskey which he had got for his own use, and that he did not tell Baldwin to get the bottle, nor sell it to him, but that Baldwin went into the shop, took the bottle of whiskey, and left a half-dollar in the chair, and that defendant did not see him get the bottle, then they must find him not guilty." (6.) "If the jury believe that Baldwin went into defendant's shop, and, without his knowledge, took a bottle of whiskey which belonged to defendant, and left a half-dollar, then, when defendant discovered that the bottle had been so taken, he had a right to take the money and get another bottle; that this would not make him guilty, and if this is all the evidence shows, they should find him not guilty."

BROWNE, McMILLAN & LEEPER, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

STONE, C. J.—The defendant was prosecuted "for selling, giving away, or otherwise disposing of spirituous, vinous or malt liquors, without a license and contrary to law." The proceeding is under a local prohibition law. Act approved February 28, 1881; Sess. Acts, 148.

We can not say there was no testimony tending to show

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that defendant sold a bottle of spirituous liquor in the town of Columbiana, Shelby county, within twelve months before the commencement of the present prosecution. Its sufficiency was a question for the jury. The County Court did not err in refusing to give the first charge asked by defendant.

There was no error in refusing any of the charges 2, 3, 4 and 5, as the same were asked by defendant. Charge No. 2 is not only argumentative, but it exacts too high a grade of proof as a condition of conviction. It sought to have the jury instructed that they must find the defendant not guilty, unless the evidence convinced them "beyond a reasonable doubt and a moral certainty" of his guilt. To justify conviction of a public offense, whether it be crime or misdemeanor, the testimony must convince beyond a reasonable doubt, but there is no recognized rule that it must be *beyond a moral certainty*. Possibly, there is an error in transcribing, but we must deal with the language as we find it. A correction of this clause, however, would not put the court in error for refusing to give it. The objection that it is an argument would still remain.—*Shepperd v. State*, 94 Ala. 102; *Mitchell v. State*, *Ib.* 68; *Hornsby v. State*, *Ib.* 56; *Chatham v. State*, 92 Ala. 47; *Brassell v. State*, 91 Ala. 45; *Brantley v. State*, *Ib.* 47; *Kirby v. State*, 89 Ala. 63; *Pellum v. State*, *Ib.* 28.

Charge No. 3 states as one constituent of its hypothesis, that though the bottle labelled "Plantation Bitters" may have contained whiskey, yet, if "defendant had no knowledge of its being whiskey, and bought it for bitters," &c. The defendant was examined as a witness, and he testified that he had taken one drink out of the bottle, not long before the alleged sale of it. He did not testify to a want of knowledge that it was whiskey, nor was there any testimony tending to prove such want of knowledge. The court does not err in refusing a charge, if any part of its hypothesis of facts has no testimony in its support.—*Pollak v. Davidson*, 87 Ala. 551; *Kidd v. State*, 83 Ala. 58.

Charge No. 4 claims defendant's acquittal, if he "did not see Baldwin get the bottle" out of a box in defendant's shop, although Baldwin, when he went in and obtained the bottle, "threw a half-dollar in the chair." Not seeing Baldwin get the bottle, was by no means conclusive that he did not sell—intentionally sell to him—the bottle with its contents. This charge was rightly refused.

Charge 5 claims an acquittal on the postulates, that defendant neither told Baldwin to get the bottle, nor saw him

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get it. Neither of these was absolutely essential to the making of a valid contract of sale. Conduct is frequently as expressive of the intention of parties as spoken words could be. It was for the jury to determine, under all the evidence, whether the intention of the parties was a parting with the ownership by Roberson, and a purchase and payment by Baldwin. If this was the intention, though only evidenced by their conduct and not in words, and if the evidence satisfied the jury beyond a reasonable doubt that such was the intended transaction between them, then that constituent element of the offense was made out. The trial court did not err in refusing this charge.

Defendant testified in his own behalf, and gave his version of the transaction. Charge No. 6 makes the substance of that version its hypothesis, and asks the court to instruct the jury, "if this is all the evidence shows, the jury should find him [defendant] not guilty." It is manifest, if what that charge hypothesizes constitutes all the defendant intentionally did, he was not guilty. It would be for the jury to determine, under all the evidence and circumstances, whether that was all he intentionally did; in other words, whether without his knowledge, either expressed or implied, Baldwin took the bottle and left a half-dollar in its stead. If this was the case—the entire case—there was no intentional sale, and no violation of the law. This charge ought to have been given.

Reversed and remanded. The defendant to remain in custody until discharged by due course of law.

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Prosecution for Selling Liquor without License.

1. *Charge as to reasonable doubt, or sufficiency of evidence.*—To justify a conviction in a criminal case, the evidence must exclude, not "every hypothesis," but every reasonable hypothesis, except that of guilt; and a charge requested, which requires that it shall exclude "every hypothesis but that of the defendant's guilt," is properly refused.

FROM the Criminal Court of Pike.
Tried before the Hon. WM. H. PARKS.

HUBBARD, WILKERSON & HUBBARD, for appellant.

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WM. L. MARTIN, Attorney-General, for the State.

MCCLELLAN, J.—Defendant was prosecuted for selling vinous or spiritous liquors without a license. Two witnesses testified to every fact necessary to make out the case as charged. Whatever the evidence to the contrary may have been, clearly this was not a case for the affirmative charge requested by defendant. It was properly refused.

The only other exception reserved went to the refusal of the court to give the following charge: "Unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they [the jury] must find him not guilty." This charge exacts too high a degree of conviction. The law does not require that the evidence, to justify a verdict of guilt, shall exclude every other hypothesis but that of guilt, but only every other *reasonable* hypothesis.—*Little v. State*, 89 Ala. 99.

The judgment of the Criminal Court must be affirmed.

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Prosecution for Assault with Knife.

1. *Warrant of arrest.*—A warrant of arrest issued by a justice of the peace, directed to "any lawful officer of the State," is in proper form (Crim. Code, §§ 4259, 4397); and if made returnable to the "Pike County Criminal Court," instead of the "Criminal Court of Pike county," the variance is immaterial.

2. *Defects in warrant of arrest*, in matters of form, are not sufficient to quash the complaint, or affidavit on which the prosecution is founded.

3. *Assault with knife.*—A conviction may be had for an assault with a knife (Code, § 3747), on proof that the defendant, during an altercation with the prosecutor, advanced on him with a drawn knife, but was stopped by a bystander, and did not get nearer to him than "five or six feet," nor attempt to cut him.

FROM the Criminal Court of Pike.

Tried before the Hon. WM. H. PARKS.

The defendant in this case was prosecuted for an "assault with a knife on the person of R. L. Ellis." The prosecution was commenced before a justice of the peace, by an affidavit made by said Ellis; and the justice thereupon issued a warrant of arrest, directed to "any lawful officer of the

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State," and returnable to the "Pike County Criminal Court." On the trial, the defendant moved to quash the warrant, "on the ground that it was not in proper form;" and he excepted to the overruling of this motion. Said Ellis, the only witness examined on the part of the prosecution, testified that the defendant, during an altercation between them about a small account, "drew his knife, and advanced to within two steps of witness with the knife open and drawn, but was caught by one Ramsey, who stepped between them, and told him to stop or he would get into trouble; and that defendant got to within about two steps of him." Ramsey and two other witnesses, who were present at the time, testified to the same facts in substance, and stated that the defendant got to "within about five or six feet," or "about seven feet;" and Ramsey further testified, that defendant "made no attempt to strike Ellis." On this evidence, the defendant asked the court to charge the jury, "If they believe the evidence, they should acquit the defendant;" and he excepted to the refusal of this charge.

D. A. BAKER, for the appellant, cited 1 Amer. & Eng. Encyc. Law, 789, 791; *State v. Blackwell*, 9 Ala. 79; *Lawson v. State*, 30 Ala. 14; *Johnson v. State*, 35 Ala. 363; *Tarver v. State*, 43 Ala. 334; *Gray v. State*, 63 Ala. 66.

WM. L. MARTIN, Attorney-General, for the State.

COLEMAN, J.—The plaintiff was tried and convicted of an assault with a knife. The prosecution began by complaint made before a justice of the peace, returnable to the "Pike County Criminal Court of said county to answer said charge." The warrant for the arrest was directed by the justice of the peace, "To any lawful officer of the State." It insisted that the warrant should have been directed to any lawful officer of the State of Alabama. The warrant follows the form given in the Code. See section 4259 of the Code, also, section 4397. This objection, if the warrant had been defective in the matter complained of, would not be a ground for quashing the complaint, which is sufficient. It could be argued with equal force that an indictment in regular form should be quashed because the *capias*, under which the indicted party was arrested, was defective.

The next objection has even less merit, to-wit, that the warrant was not made returnable to "the Criminal Court of Pike county." It was made returnable to the "Pike County Criminal Court of said county." We are unable to discover the merit, if any exists in this objection.

[Prior v. The State.]

The next exception is to the refusal of the court to charge the jury, "That if the jury believe the evidence, they should acquit the defendant." There was legal evidence before the jury which, if believed, clearly showed the defendant's guilt. The charge was properly refused.

Affirmed.

Prior v. The State.

Indictment for Carrying Concealed Weapons.

1. *Conviction of larceny, as affecting competency or credibility of witness.*—Under statutory provisions (Code, § 2786), a conviction of larceny does not destroy the competency of a witness, but is admissible as evidence affecting his credibility.

2. *Charge invading province of jury, as to sufficiency of impeaching evidence.*—A charge instructing the jury, in a criminal case, that the testimony of an impeached witness, to the effect that they would not believe another witness on oath, "is sufficient to generate a reasonable doubt of the defendant's guilt, when a conviction is dependent on the testimony of that witness, and there is no evidence in support of his testimony," invades the province of the jury, and is properly refused.

FROM the Criminal Court of Pike.

Tried before the Hon. WM. H. PARKS.

In this case, the defendant was indicted for carrying a pistol concealed about his person. On the trial, one Dickinson, a witness for the prosecution, testified that, on a day named, he was present at a camp-meeting with the defendant and others, and saw a pistol fall out of the defendant's hip-pocket, that he picked it up, and handed it to the defendant, who then put it in his pocket, where it was out of sight; that the pistol fell out a second time, was picked up by another person, handed to the defendant, and again put in his pocket. Another witness for the prosecution testified that the defendant, when arrested, said that he had a pistol at the time mentioned, but that Dickinson did not see it. The defendant, testifying for himself, denied that he had a pistol at the camp-meeting, and denied that he made the statement attributed to him; and he introduced two witnesses who testified, that they knew the general character of said Dickinson, and that they would not believe him on oath. On this evidence, the defendant asked a charge in these words, and excepted to its refusal: "The evidence of

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witnesses whose testimony stands unimpeached, that another witness in the case is a person of bad character, and that they would not believe him on oath in a court of justice, is sufficient to generate a reasonable doubt of the defendant's guilt, when a conviction is dependent on the testimony of that witness, and there is no evidence in support of his testimony." Other exceptions were reserved as shown by the opinion.

WM. L. MARTIN, Attorney-General, for the State.

HEAD, J.—Defendant, being on trial for the offense of carrying concealed weapons, testified as a witness in his own behalf. The State introduced in evidence the record of his prior conviction, and sentence thereon, of the offense of petit larceny, for the purpose solely of affecting his credibility as a witness. It was so expressly limited by the court. There was a general objection by the defendant to its introduction, which was overruled, and defendant excepted. The ruling of the court was proper, under the influence of section 2766 of the Code of 1886.

The charge requested by the defendant is bad for several reasons. It invades the province of the jury. It was for the jury to determine the weight and value of the impeaching testimony, and whether impeachment of the witness Dickinson was made out or not; and if made out, it was for them to say whether it was sufficient to generate a reasonable doubt of the defendant's guilt or not. The charge is also abstract, in that it states a case in which the testimony of the witness supposed to be impeached is not supported by any other evidence. In this case, there was evidence in support of Dickinson,

There is no error in the record, and the judgment is affirmed.

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Action against Foreign Corporation for Statutory Penalty.

1. *By whom action may be instituted, and in what court.*—The statute imposing a penalty on foreign corporations doing business in this

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State, without a compliance with constitutional and statutory provisions regulating their right to do business here (Sess. Acts 1886-7, p. 102), provides that an action to recover the penalty shall be brought in the name of the State, "by the solicitor of the circuit in which the offense is committed," but does not specify the court in which it shall be brought; and the City Court of Gadsden having all the powers and jurisdiction of a Circuit Court, while its solicitor is "charged with the performance in said court of all the duties imposed by law upon circuit solicitors;" *held*, that an action to recover such penalty may be brought in said court and by its solicitor.

2. *Judgment by default against corporation, without writ of inquiry.* In an action against a corporation to recover a statutory penalty, judgment by default may be rendered on proof of service on a person named as agent; and the penalty being necessarily the amount of the recovery, no writ of inquiry is necessary to assess the damages.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

Action in the name of the State, against a foreign corporation, to recover a statutory penalty. Judgment by default, for amount of penalty.

J. A. BILBRO, for appellant. (1.) The statute under which this action was brought, being highly penal, is to be strictly construed.—*Grooms v. Hannon*, 59 Ala. 510; *Dale Co. v. Gunter*, 46 Ala. 118; *Janney v. Buell*, 55 Ala. 408. The right and duty to bring the action are conferred only on "the solicitor of the circuit," and the action must necessarily be brought in the Circuit Court. The solicitor of the City Court of Gadsden had no authority to bring the action, and that court had no jurisdiction of it.—*Stevenson v. O'Hara*, 27 Ala. 362; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136. (2.) A judgment by default, without writ of inquiry, can only be rendered on an "instrument of writing ascertaining the plaintiff's demand."—Code, § 2740; *Warwick v. Brooks*, 67 Ala. 252; *Man. Fire Ins. Co. v. Fowler*, 76 Ala. 372; *Wagner v. Turner*, 73 Ala. 197. (3.) In an action against a corporation, where process is served on an agent, the character and fact of agency ought to be proved.

B. F. POPE, *contra*.

HARALSON, J.—The act of the legislature, "to give force and effect to section 4, Article xiv of the Constitution of the State of Alabama," approved February 28, 1887 (Acts 1886-7, p. 102), provides, that it shall be unlawful for any company, corporation or association, not organized under the laws of this State, to engage in or transact any business in the State, before complying with the provisions

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of section one of that act, and any such company, corporation or association violating the provisions of the act, shall, for each offense, forfeit and pay to the State, the sum of one thousand dollars. Section 5 of the act provides, that every penalty provided for in this act shall be sued for and recovered in the name of the State of Alabama, by the solicitor of the circuit in which the offense is committed, and when sued for and collected, must be paid by the solicitor into the State treasury, less 25 per cent. to be retained by said solicitor for his services," &c.

Benjamin F. Pope, as the solicitor of the City Court of Gadsden, commenced this proceeding in said City Court, in the name of the State against the defendant, alleged to be a corporation not organized under the laws of this State, and which was alleged to have violated section 4 of said act, to recover of it the penalty of \$1,000, as there prescribed. There are several counts in the complaint, and it is noticeable that in none of them is it stated what business the defendant did carry on in the State in violation of said act. This may have been good ground of demurrer, but we do not now pass on that point, as it is not before us. The summons and complaint purport to have been executed by the sheriff, on the 10th November, 1891, on J. E. Whaley, as agent of the defendant corporation, and the judgment entry recites, that proof was made that J. E. Whaley was the agent of the defendant, at the time of the service of the summons and complaint on him. The defendant made default, and on the 7th March, 1892, the court rendered a judgment against it, without the intervention of a jury, for \$1,000 damages and costs, upon no other proof, so far as the record shows, than the proof of service as above stated. There is no bill of exceptions in the record.

The act creating the City Court of Gadsden, approved February 18, 1891 (Acts 1891-92, p. 1092), provides, in its first section, that the "court shall have and exercise all the jurisdiction and powers which now are or may hereafter be by law conferred on the several Circuit Courts of this State." The act of February 28th, 1887, does not provide in terms in what court the suit for the penalties therein provided shall be brought. Its language is, "That every penalty provided for in this act shall be sued for and recovered in the name of the State of Alabama, by the solicitor of the circuit." These words imply, plainly enough, that the Circuit Court is referred to; but they are not exclusive of the City Courts of the State, having and authorized to exercise the same jurisdiction and powers, in all respects, as the Circuit Courts.

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In respect to the power of the judge of the City Court of Selma, it was provided in the charter creating that court, that its judge should have power and jurisdiction co-extensive with that which is exercised by judges of the Circuit Court and chancellors, and declared, specially, that this power and jurisdiction should include "the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs;" and, under this grant of power we held, that the judge of that court had, in respect of such writs, the same power and authority to issue them, returnable in any part of the State, as any other judge or chancellor had.—*E. & W. R. R. Co. v. E. T., Va. & Ga. R. R. Co.*, 75 Ala. 279; *Stevenson v. O'Hara*, 27 Ala. 362; *Matthews, Finley & Co. v. Sands*, 29 Ala. 136.

The statute creating said City Court of Gadsden, in its 11 section, provides for the election by the General Assembly of a solicitor of said court, who "shall be charged with the performance of the same duties in the said City Court, and subject to the same liabilities and penalties in respect thereto, as are by law imposed upon circuit solicitors in like cases in the Circuit Courts of this State." It appears, therefore, that the City Court of Gadsden had jurisdiction of this cause, and its solicitor the authority to institute and prosecute this suit in the name of the State. The authority to institute the proceeding, conferred by the first statute referred to—that of 28th February, 1887,—on the circuit solicitors, it may be fairly inferred, was designed by the legislature to be extended by the later enactments to the solicitor of the City Court of Gadsden, which court has like jurisdiction with the Circuit Court, of causes for the violation of said penal law. The power to institute such proceedings was not special, and designed to be confined to the Circuit Court solicitors, to the exclusion of the City Court and county solicitors, if the same duties and responsibilities are imposed upon them as upon the former class. *Authorities supra.*

There was no necessity for a writ of inquiry to assess the damages in this case. The suit was for a statutory penalty, and judgment had to be rendered for the amount of the penalty, if for anything, against the defendant. Such a recovery followed necessarily the rendition of a judgment by default.

We find no error in the record, and the judgment must be affirmed.

[The State v. Woodson.]

The State v. Woodson.

Prosecution for Bastardy.

1. *Local jurisdiction.*—A prosecution for bastardy (Code, § 4842), if made during the pregnancy of the complainant, must be made in the county in which she lives, or is for the time being; but, if not made until after the birth of the child, it must be made in the county in which the child was born.

2. *Limitation of prosecution.*—Under statutory provisions (Code, § 4848), a prosecution for bastardy can not be instituted "after the lapse of one year from the birth of the child, unless the defendant has in the meantime acknowledged and supported the child."

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. JOHN R. TYSON.

WM. L. MARTIN, Attorney-General, and M. W. RUSHTON,
for appellant.

GAMBLE & BRICKEN, and J. H. PARKS, *contra*.

STONE, C. J.—This was a proceeding instituted before a justice of the peace in Crenshaw county, charging the defendant, Woodson, with bastardy, under section 4842 of the Code of 1886. The statute, so far as it sets forth the nature and constituents of the offense, and the jurisdictional venue prescribed for its trial, has remained substantially unchanged ever since its enactment, December 13, 1811. Toulmin's Dig. 64-5-6; Clay's Digest, 133. Its present form—§ 4842 of the Code of 1886—is as follows: "When any single woman, pregnant with or delivered of a bastard child, makes complaint on oath to any justice of the county where she is so pregnant or delivered," &c. The statute permits this proceeding to be instituted pending the pregnancy, or it may be delayed until after the birth of the child, at the option of the party complaining.

Many years ago this statute was interpreted by this court, and it was held that, if the complaint was made pending pregnancy, then it must be before a justice of the county in which the complaining prosecutrix, for the time being, is or has her habitation. On the other hand, if the complaint is not preferred until after the birth of the child,

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it must be made in the county in which the child was born. *Pruitt v. The Judge Co. Court*, 16 Ala. 705; *Wilson v. Judge, &c.*, 18 Ala. 575. In *Williams v. State*, 29 Ala. 9—a bastardy case—this court said: "A proceeding in bastardy can be commenced only before a justice. His jurisdiction to proceed in the summary mode provided by the Code depends upon the existence of the following preliminary facts: 1st, that a woman should make a complaint on oath to him, accusing a particular person of being the father of a bastard child with which she is pregnant, or of which she has been delivered; 2d, that the woman making the complaint is a single woman; that she is so pregnant, or has been so delivered, in the county of which the justice acts as justice." We may add, this is the only interpretation of the statute its language permits us to give to it.

The affidavit for the warrant of arrest in this case was made before a justice of the peace of Crenshaw county, on March 20, 1891. This was the institution of the proceeding, and the warrant of arrest bears the same date. Prosecutrix made oath "that she is now, and was a single woman on the 5th day of January, 1889; and that she was delivered of a bastard child on the said 5th day of January, 1889, in Macon, Georgia, but that she was pregnant with said child in Crenshaw county, Alabama, and that conception took place in said county and State." In the Circuit Court, on motion of defendant, the proceedings were dismissed by order of the court, because the affidavit of complaint clearly showed that neither the justice of the peace nor that court had jurisdiction of the case. The charge was not made, nor the warrant of the arrest sued out, while the prosecutrix was pregnant. Hence it was not enough that she was then in Crenshaw county. She had been delivered of the child, and to give the justice or the Circuit Court local jurisdiction, it was essential that she should have been "delivered" in that county.

There was formerly no statute of limitations to proceedings under this statute. The law is now different. Under the Code of 1886 (§ 4848), it is declared that "no proceeding shall be instituted under this chapter after the lapse of one year from the birth of the child, unless the defendant has, in meanwhile, acknowledged or supported the child." The affidavit in this case shows that the proceedings were instituted more than two years after the birth of the child.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

[Reese v. Nolan.]

Reese v. Nolan.*Contested Probate of Will.*

1. *Application for probate; nature of proceeding, and parties to contest.*—An application for the probate of a will is a proceeding *in rem*, and though notice to the next of kin is required (Code, § 1987), they are not parties, unless they appear and contest, or actively engage in the litigation.

2. *Same; parties to appeal, and practice.*—One of the next of kin who, though notified, did not appear on the contest, can not sue out an appeal from the decree admitting the will to probate, nor join in an appeal sued out by the contestants; but, if he was not notified, he may propound his interest by petition to the court below, and, having then been made a party, may sue out an appeal.

3. *Same; notice to next of kin, and failure to give.*—The failure to give notice to one of the next of kin does not render the probate void, but is a mere irregularity, of which the others can not complain on error.

4. *Same; reducing testimony of witnesses to writing, and recording it.* The statutory provision which requires that the testimony of the witnesses on the hearing shall be reduced to writing, subscribed by them, and recorded with the will in a book provided for the purpose (Code, § 1982), is directory merely, and a failure to comply strictly with it does not avoid the probate. Where the record shows, as here, that the subscribing witnesses were examined on the trial of the contest, and sets out the substance of their evidence, showing the due execution of the will, and the decree admitting the paper to probate, declaring that it has been duly proved, further orders the will and all the papers on file relating to it to be recorded,—this is a substantial compliance with the requirements of the statute.

APPEAL from the Probate Court of Chambers.**Heard before the Hon. LLOYD ROBERTSON.**

In the matter of the probate of the last will and testament of Mrs. Peggy Nolan, deceased, which was propounded for probate by her surviving husband, and contested by Julata Reese, one of the heirs-at-law and next of kin. The facts of the case were thus stated by Judge HARALSON, who delivered the opinion of the court.

“On the 17th day of November, 1892, R. Nolan filed in the Probate Court of Chambers county a paper purporting to be the last will and testament of Peggy Nolan, his deceased wife, and prayed that it be admitted to probate. The petitioner made known, that Jack Reese, Sarah Reese, Julata Reese and Annie Cherry, wife of Gibson Cherry, were the

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brother and sisters and next of kin of said Peggy Nolan, whose ages and places of residence were stated. On the 10th day of December, 1892, Julata Reese, claiming to be a sister and an heir-at-law of the deceased, appeared before the court, and filing her grounds of contest of said will, prayed the court that an issue be made up under the direction of the court, between said Richard Nolan, the proponent of said will, and herself, and that a day be set for the trial of the question as to the validity of the paper filed purporting to be the last will of said deceased. It was thereupon ordered, that the 23d day of January, 1893, be set as the day on which to try said issue. On that day, an issue was made up between the said Richard Nolan, as proponent, plaintiff, and the said Julata Reese, contestant, defendant, and a trial was had between them on issue joined; the result of which was, that the court found the issues in favor of the proponent, and established said will and admitted the same to probate in said court.

"The judgment-entry recites, 'that notice of said application, and of the time appointed for hearing the same, has been given in pursuance of law to all the next of kin of said Peggy Nolan, deceased, by citations personally served on said Julata Reese, Sarah Reese and Anna Cherry, as next of kin of said Peggy Nolan, deceased.' The record does not show that any of the parties who were cited as the next of kin and heirs of deceased, except Julata Reese, appeared and were made parties to, or in any wise participated in said trial of the contest of said will.

"On February 20, 1893, Julata Reese, Jack Reese, Sarah Reese and Anna Cherry, by their attorneys, filed a paper in the Probate Court, stating that they 'take an appeal from the decree rendered in said court on the 23d day of January, 1893, admitting to record and probate the will of Peggy Nolan, deceased, to the Supreme Court of Alabama,' &c. These parties appear by their attorneys in this court, and assign errors together, and Jack Reese assigns the same errors separately. The errors assigned are, that Jack Reese, an heir-at-law and one of the next of kin of testator, had no notice of the application to prove said will, and that the testimony of the witnesses proving that the will was duly executed was not reduced to writing and signed by them, as required by section 1982 of the Code."

ROBINSON & DAKE, for appellants.

JNO. M. CHILTON, and W. H. THOMAS, *contra*.
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HARALSON, J.—It appears on the face of the record in this case, that the will of the testator, Peggy Nolan, deceased, was propounded for probate in the Probate Court of Chambers county, by Richard Nolan, the husband and sole legatee and devisee of said testator; that Julata Reese, one of the next of kin and heirs of said Peggy Nolan, filed her objections in said Probate Court to the probate of said will; that an issue was made up under the direction of the court, between said Richard Nolan as plaintiff, and the said Julata Reese, contestant, as defendant, which was tried between them in said court, which resulted in a judgment of said court in favor of the validity of said will, and the same was duly admitted to probate. To this contest, none of the persons, except Julata Reese, who appear here as defendants, were parties, or, so far as appears, had anything to do with the proceedings in said court to try the validity of said will. The judgment-entry recites, that “notice of the said application [to probate said will], and of the time appointed for hearing the same, has been given, in pursuance of law, to all the next of kin of said Peggy Nolan, deceased, by citations personally served on said Julata Reese, Sarah Reese and Anna Cherry, as next of kin of said Peggy Nolan, deceased.” The names of these persons and that of Jack Reese, together with their respective ages and residences, were given in the application of the propo- nent for the probate of the will; but it does not appear that the said Jack Reese ever had any notice of said application, or of the time and place for hearing the same.

In *Blakey v. Blakey*, 33 Ala. 616, it was said “when a will is propounded for probate, the proceeding is *in rem*. The object of the statute which requires that notice of the application shall be given to the widow and next of kin of the testator is, that such persons may, if they choose, make themselves parties to the proceeding. When notified, they have the option to stand by passively, or take an active part on either side. But they can not be considered parties to the suit, unless they come forward, and by some affirmative act engage in the litigation. Hence, when an issue is formed in the Probate Court, between the propo- nent and persons contesting the will, the former is deemed the plaintiff and the latter are considered the defendants. They alone are parties to the suit.”—*Leslie v. Simms*, 39 Ala. 161. Until made parties they can not be heard here on appeal.—*May v. Courtney*, 47 Ala. 183, *Jones v. Walker*, 23 Ala. 448. Such persons are not concluded, however, by the decree of the Probate Court to which they were not

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parties. The practice in such cases has long been settled in this State. Though they can not sue out an appeal without being parties, they may by petition to the Probate Court propound their interest, and, after notice to the party having an interest, have themselves made parties to such decree, so as to prosecute an appeal therefrom.—*Clemens v. Patterson*, 38 Ala. 721; *Hall v. Hall*, 47 Ala. 295; *Lajons v. Hamner*, 84 Ala. 197; *Kumpe v. Coons*, 63 Ala. 455; 1 Brick. Dig. p. 92, § 129.

The party to the contest in the Probate Court, Julata Reese, has no ground of complaint, that Jack Reese, one of the next of kin of testator, had no notice of the application to probate the will. Its probate, upon a proper application, without notice to any of the parties entitled thereto, would not be void, but merely voidable. The failure to give such notice is merely irregularity.—*Hall v. Hall*, *supra*; *Otis v. Dargan*, 53 Ala. 185.

The provisions of section 1982 of the Code, requiring, if it appears on the proof taken before the judge of probate that the will was duly executed, that the testimony of the witnesses be reduced to writing by the judge, signed by the witnesses, and, with the will, recorded in a book provided for the purpose, are also directory, and a failure to comply therewith will not avoid the probate. In this case, it appears on the face of the record that the subscribing witnesses were examined on the trial of the contest before the judge, and the substance of their testimony is set out, showing the due execution of the will; and upon their evidence and the other evidence, it was ordered that the will be admitted to probate, and declared to be duly proven as the last will and testament of said Peggy Nolan, and that said will and all other papers on file relating to the proceeding be recorded. This answers substantially the requirements of that section.

It follows, that the appeal must be dismissed as to all the appellants, except as to Julata Reese, and as to her the judgment of the Probate Court, admitting said will to probate is affirmed.

Salter v. The State.

Indictment for Disturbing Religious Worship.

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133	617

1. *Constituents of offense.*—A conviction may be had for disturbing an assemblage of persons met for religious worship, (Code, § 4033), on proof that the defendant did any willful act, within the terms of the statute, the natural consequence of which was to disturb the assemblage, and which did in fact disturb them. although he did not have the purpose and specific intent to disturb them —(*Harrison v State*, 37 Ala. 154, d. clared limited and explained by later decisions.)

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. JOHN R. TYSON.

The appellant was indicted, tried and convicted for disturbing religious worship, under the statute, (Code, § 4033). The evidence, as shown by the bill of exceptions, was in direct conflict; that for the State tending to show that at a certain church, just as the congregation was leaving the church, the defendant came up to his brother, Ben Salter, as he walked out of the church, and accosted him in reference to his having talked about him, the defendant, and that a quarrel ensued. The testimony for the defendant tended to show that the said Ben Salter brought on the quarrel with the defendant. The defendant requested the court to give the following written charges, and separately excepted to the refusal to give each of them as asked: (1.) "The court charges the jury that they must believe to a moral certainty and beyond a reasonable doubt that this defendant willfully interrupted or disturbed a congregation of people met together for religious worship, and they must also believe from the evidence beyond a reasonable doubt that such disturbance was caused by noise, profane discourse, rude or indecent behavior at or near the church or place of worship, intentionally performed by the defendant, before they can find him guilty, and if the jury believe from all the evidence that such act or acts were performed heedlessly or recklessly, that is carelessly or without thinking of the probable consequences of such act or acts, then the jury should find the defendant not guilty." (2.) "The court charges the jury, that the intent is the very essence of this offense, and for the disturbance to be willful it must be something more than mischievous; it must be in its

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character vicious and immoral, before they can find the defendant guilty." (3.) "The court charges the jury that before they can find the defendant guilty, they must believe to a moral certainty and beyond a reasonable doubt, that there was not only an actual interruption or disturbance of an assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior at or near the place of worship, but such interruption or disturbance must be willfully made by the defendant, and that such acts did disturb the congregation met for religious worship." (4.) "The court charges the jury that unless they believe from all the evidence in this case beyond all reasonable doubt, and to a moral certainty that the congregation or some portion of the same, met for religious worship, were disturbed, and that this disturbance was by the acts or words or conduct of the defendant, which he did intentionally for the purpose of disturbing such assembly or some portion of it, or that the defendant did acts or employed such language, or was guilty of such conduct so near to the place where he knew a worshipping assembly was congregated, as that he must have known that such worshipping assembly would be disturbed by such acts, language or words, then they should find the defendant not guilty."

No counsel marked for appellant.

WM. L. MARTIN, Attorney-General, for the State, cited *Johnson v. State*, 92 Ala. 82; *Goulding v. State*, 82 Ala. 48; *Williams v. State*, 83 Ala. 68; *Morris v. State*, 84 Ala. 457; Code, § 4033.

McCLELLAN, J.—Each of the several charges refused to the defendant is based on the theory, that an essential element in the offense of disturbing religious worship, denounced by section 4033, is a purpose and specific intent on the part of the party charged to *disturb* the assemblage of people met for religious worship. This idea found some support in the case of *Harrison v. State*, 37 Ala. 154; but that case has been limited and explained by later adjudications, which have thoroughly established the doctrine, that a purpose and intent to disturb is not a necessary factor in the crime, but, to the contrary, that any act, which is within the terms of the statute, the natural consequences of which are to disturb, and which is willfully done, and which in fact does disturb an assemblage of people met for religious worship, comes under the denunciation of the

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law, though the actor may have had no intent to disturb the assemblage.—*Goulding v. State*, 82 Ala. 48; *Johnson v. State*, 92 Ala. 82; *Lancaster v. State*, 53 Ala. 398.

The charges were properly refused; and, no other question being presented by this record, the judgment of the Circuit Court must be affirmed.

Fargason & Co. v. Hall.

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107 681

Bill in Equity by Creditors to set aside Sale of Goods by Debtor as Fraudulent.

1. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—When a sale of his entire stock of goods by an insolvent debtor to one of his creditors is attacked by other creditors on the ground of fraud, the only questions for consideration are, (1.) the *bona fides* of the consideration paid; (2.) its sufficiency, and (3.) whether any benefit was reserved to the debtor; if the debt of the purchasing creditor is *bona fide* due and subsisting, its amount not much less than the reasonable value of the goods, and no benefit is reserved to the debtor, the transaction will be sustained against the attack of other creditors.

2. *Same; case at bar.*—In this case, the court examines and states the evidence, and holds the transaction valid, finding (1.) that the debts of the purchasing creditors were *bona fide* due and subsisting, and amounted to \$2,825; (2.) that the goods were valued at \$8,000, and were afterwards sold by the receiver in the cause for \$3,164; (3.) that the sale also included the debtor's outstanding notes and accounts, which were estimated at \$850, and on which the receiver collected \$804; (4.) that these were included in the sale on the urgent insistence of the debtor, in order that he might pay certain other creditors, and the money was used by him for that purpose; and (5.) that no benefit was reserved to him.

APPEAL from the Chancery Court of Colbert.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 5th day of November, 1889, by the appellants, J. T. Fargason & Co., against the appellees, and its object was to set aside as fraudulent against his creditors, a sale of a stock of goods and his notes and accounts, made by A. M. Hall to Throne, Franklin, Nance & Adams, and J. S. Reeves & Co., the two defendant firms, to which he was indebted.

"The material allegations of the bill are, that prior to the 25th of October, 1889, A. M. Hall was a merchant at Cherokee, Alabama, carrying on a general merchandise

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business, and had been so engaged for several years; that on that date said Hall was indebted to complainants in a large sum of money—\$2,640.62; that he was insolvent, and on that date he sold all his stock of goods, notes and accounts, to the defendant firms, the consideration being the debts he was then owing said defendants, which are alleged to have been less than \$3,000, and \$800 in cash then and there paid to him; that the consideration for the alleged sale was inadequate, not being more than one-half of the value of the property transferred; that defendants knew that said Hall was insolvent, and that the property attempted to be transferred to them was worth more than twice the amount of their debts; that said attempted sale was made to hinder, delay and defraud the complainants, and the other creditors of said Hall, and was fraudulent and void, and the prayer is to have it so declared.

“On the application of the complainants, a receiver was appointed, who took charge of the property transferred to defendants, sold the goods, collected the notes and accounts, as far as practicable, and has the proceeds in hand. A separate answer was filed by A. M. Hall. The other defendants answered, admitting the insolvency of Hall, and their belief of that fact at the time they made said purchase. They allege that the property they bought was worth less than they paid for it, and deny the allegation that it was worth more. They also allege that, in their transactions with Hall, they gave up their claims against him, aggregating the sum of \$2,825, and paid to him \$853 in money, for the purpose and with the understanding and requirement on their part, that he should pay the same to certain creditors of his for borrowed money, whose names he gave; that Hall himself required them to pay this sum in cash, as a condition to his making the sale, so that he might pay off these debts, and that he did accordingly pay out the whole sum thus received for that purpose. They state the amounts of their respective debts, which they allege to be due, owing and *bona fide*; deny that any benefit was reserved to the said Hall, or that there was any fraud or purpose to hinder and delay the other creditors of said Hall, but that the transaction was fair and honest.

“The chancellor, on final hearing, denied the relief prayed for by complainants, and they prosecute this appeal to reverse that decree.”

R. W. WALKER, and with him HUMES, SHEFFEY & SPEAKE,
for appellants.

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Leaving out of view the payment in cash as a feature affecting the validity of the transaction, it may be considered as payment of existing debts by the transfer of property in discharge and satisfaction thereof. In considering the transaction in this light, the following propositions are to be kept in view: As between a grantee in a conveyance executed by an insolvent debtor, in payment and satisfaction of an antecedent debt, and an existing creditor who attacks the conveyance as fraudulent, the burden is on the grantee to show that the consideration of the conveyance to him was both *valuable and adequate*.—*Skipper v. Reeves*, 93 Ala. 332; *Sides v. Scharff*, 93 Ala. 106; *Mobile Savings Bank v. McDonnell*, 89 Ala. 434; *Roswald v. Hobbie*, 85 Ala. 73; *Wedgeworth v. Wedgeworth*, 84 Ala. 274; *Moog v. Farley*, 79 Ala. 246. When an insolvent debtor conveys property to one of his creditors in payment of an existing debt, the transaction is fraudulent as to his other creditors, if the property received by the preferred creditor is of a value materially greater than the amount of the debt, in payment of which it is taken. The value of the property must be no more than the fair equivalent of the sum of indebtedness which it discharges. The amount of indebtedness discharged must correspond with the fair and reasonable value of the property taken in payment.—*Bell v. Kendall*, 93 Ala. 489; *Mobile Savings Bank v. McDonnell*, 89 Ala. 434; *Lehman v. Greenhut*, 88 Ala. 478; *Knowles v. Street*, 87 Ala. 357; *Leinkauff v. Frenkle*, 80 Ala. 136; *Pritchett v. Pollock*, 82 Ala. 169. The limit of the creditor's right to obtain a preference is reached when he gets a sufficiency in value of the debtor's property to discharge his own debt. When he gets property worth more than the amount of his debt, the excess is so much taken from that which the other creditors have the right to subject to the payment of their demands. He gets more than the equivalent of the sum due him. In fact, his debt is more than paid. This is a diversion of so much of the debtor's property from the payment of his debts. The preferred creditor obtains an advantage beyond the satisfaction of his own demands. This is at the expense of the rights of other creditors. As to them it is a fraud which vitiates the entire transaction.—*Carter v. Coleman*, 82 Ala. 177; *Levy v. Williams*, 79 Ala. 171. Applying these propositions in the consideration of the evidence in this case, the impeached transaction must be declared fraudulent against complainants.

KIRK & ALMON, *contra*.—Hall, though insolvent, had the right to pay these respondents and his home debts in pref-

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erence to any others.—*Moog v. Farley*, 79 Ala. 252; *Hubbard v. Allen*, 59 Ala. 283; *Bradley v. Ragsdale*, 64 Ala. 558; *Chipman & Co. v. Stern*, 89 Ala. 207. The property embraced in the sale was all the debtor owned, and the payment of \$850 to him was less than his lawful exemption.—*Carter v. Coleman*, 84 Ala. 256; *Rankin & Co. v. Vandiver*, 78 Ala. 562. In estimating the value of the goods, some latitude must be allowed for difference of opinion.—89 Ala. 207; 89 Ala. 434. Hall had the right to sell his property and apply the proceeds in payment of his debts; and if the purchaser had a reasonable expectation that the money would be so applied, he is not chargeable with participation in any secret fraudulent intent of the debtor.—*Levy v. Williams*, 79 Ala. 179.

HARALSON, J.—There is no dispute between the parties as to the legal principles by which this case is to be decided. They have been so repeatedly declared by this court, as to require but little repetition of them here. There are three inquiries, and only three, to which consideration need be devoted, in a case of this kind, viz., the *bona fides* of the consideration paid, its sufficiency, and whether or not there was a reservation of benefits to the debtor.—*Pollock v. Meyer*, 96 Ala. 172; 11 So. Rep. 385; *Dawson v. Flash*, 97 Ala. 539; 12 So. Rep. 69.

There is no controversy as to the *bona fides* of the debts which respondents held against said Hall. It is clearly shown, and is not denied, that he owed the defendants, Throne, Franklin, Nance & Adams, the sum of \$1,304, and to defendants J. S. Reeves & Co. \$1,521.39; aggregating \$2,825.39. Nor is it denied, for it is fully established by the proof, that the defendants together paid to Hall, as a part of the consideration of the trade, the sum of about \$853 in cash—an amount of money which Hall was owing to other creditors for sums borrowed of them, which he felt special concern to pay. The proof tends to show, and is satisfactory to that end, that the representatives of the defendants—Nance and Neely—who conducted the negotiation, did not desire to purchase the notes and accounts, but simply the stock of goods, but that Hall would not make the sale, unless these were included; and yielding to his terms, they furnished him the amount of money he required to pay this indebtedness for borrowed money, the larger part of which was owing to his father and brother. Hall, who was examined by the complainants, swears to this fact, and also, that he paid every cent of the amount thus paid to him to these creditors; and he produced on the trial

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their receipts to corroborate this statement. He says the complainants made no demand of him to pay these debts, but that he did require from them the money for the purpose; but Nance and Neely both swear he gave them the names of these creditors, and they paid the sum required with the understanding that it should be paid over to them, which Hall informed them afterwards he had done, and produced the receipts to show. Their version of the transaction is to be credited as the correct one, since it is natural, and what we might expect of them under the circumstances, having been advised by their counsel how to act. Hall had the right to pay these creditors, in preference to others, out of the proceeds of the sale of his property; and the purchasers will not be held to a fraudulent intent, in having paid to him this sum of money, as a part of the purchase price of the goods, if they paid it, and had a reasonable expectation, at the time, that it would be used for the purposes specified, and it was in fact so used.—*Chipman & Co. v. Stern*, 89 Ala. 207; *Levy v. Williams*, 79 Ala. 179; *Rankin v. Vandiver*, 78 Ala. 562; *Hodges v. Coleman*, 76 Ala. 103. It thus appears that the debts of the respondents, which were satisfied in the sale of the goods, notes and accounts, were *bona fide*, and that the money paid as the balance of the consideration for the purchase was honestly and fairly paid.

As to the value of the goods sold, and the notes and accounts transferred, there is conflict in the evidence. It would extend this opinion at too great length, and would be unnecessary, to review in detail the evidence of the witnesses as to these values. Referring first to the goods: the complainants, to prove their value, examined four witnesses, including the defendant, A. M. Hall, neither of whom, except Hall, showed a knowledge of the stock from an examination of it, or had experience which would entitle them to be considered as very competent to speak in reference to such matters. But, with such experience and knowledge as they had, they gave it as their opinion that the goods were worth 75 cents on the dollar of their original cost. Hall says they were worth that price. On the cross-examination, he admitted that he had sold the stock for \$3,000; that the transaction was fair and honest; that the times were hard, people poor, and money very scarce; that he was about a week negotiating the trade with defendant's representatives; that he had been in business since 1881, and the stock in store was composed, partly, of accumulations of goods since that time, but there were not a great many old goods; that he

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had on hand five or six hundred dollars worth of new goods, and had many that had been carried from the winter before, and most of the summer goods had been brought over from the past summer; that there was a difference between him and the representatives of the defendants as to the value of the goods, notes and accounts; that they did not propose to pay exceeding \$500 over and above the amount he owed them, but he demanded \$800; that finally the sale was consummated, and the goods were valued in the transaction at \$3,000, and the notes and accounts at \$679.

On the other side, Nance and Neely, who made the negotiation with Hall, both depose that they paid more for the goods than they believed they were worth; that they had been selling to him for the past eight or nine years, and had sold him the greater part of the goods he had bought; that they had seen his stock several times a year, and had kept up with it; that the stock was old for the greater part, and was not worth exceeding \$2,600, but that they offered him the amount of their debts—\$2,825—and \$500 for the goods, notes and accounts, but he declined the offer, and required \$300 more; and trade was finally concluded, valuing the stock at \$3,000, and the notes and accounts at \$679.

Defendants examined seven other witnesses as to values, three of whom testified to many years experience in mercantile business, and to having examined this stock of goods; two of them giving it as their opinion, that it was not worth more than 50, and one that it was worth 60 per cent. on the cost price. The other four, who had had some experience with second-hand stocks of goods, testified that 50 per cent. on the cost price was a fair valuation of them. The stock, as inventoried by the receiver, at net cost, amounted to \$4,276. If valued at 75 cents on the dollar, as estimated by complainants' witnesses, it was worth \$3,200; and if at 50 cents, as estimated by other witnesses, then \$2,100, making a difference in their estimates of \$1,100. In proving the consideration of sale of this character, the law allows room for the ordinary difference of opinion, and will not weigh the estimates of values in too exacting a balance.—*Mobile Savings Bank v. McDonnell*, 89 Ala. 447.

But we have other evidence to aid us in the approximate value of the goods. The court appointed Amos L. Moody, the register in chancery, as the receiver in this suit, who took possession of the property transferred, and proceeded to sell the goods and collect the claims. The receiver's sales amounted to \$3,617.75. He was about ten months in closing out the stock, a part of it at private sale, and some

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at auction. His expenses, which he swears were curtailed to what was absolutely necessary, amounted to \$908.85, leaving as a balance, on that account, \$2,708.90. But, before the receiver took charge, the defendants had sold \$625.70 worth of goods, at a cost of \$115.08, and had added \$55.00 worth of new goods, which the receiver got, together amounting to \$170.08, to be deducted from the gross sales; leaving a balance of \$455.62, to be added to the \$2,708.90, making \$3,164.52, as the approximate value of the goods at the time they were sold to the defendants, being \$164.52 more than defendants paid for them. Under the circumstances, we can not regard \$3,000 paid for \$3,164.52 worth of goods, as so materially less than their value as to make the sale fraudulent, especially when it is remembered, that for the ten months between the sale by the defendants and the closing out of the receivership, the interest on the amount the defendant paid for the goods exceeded this difference of \$164.52, and that the interest is still running against them, and none in their favor, on the sum remaining in the hands of the register. But, in addition to this, it is clearly shown that Hall transferred every thing he owned, without the reservation of any exemptions; and if the amount paid in cash was less than the exemptions to which he was entitled, the other creditors can not complain of the transaction, since they are not injured by it.—*Brinson v. Edwards*, 94 Ala. 448.

For convenience, we consider the transaction of the notes and accounts separate from the sale of goods, although they were one and the same. These were estimated, and included, at \$679. After an effort, extending over nearly two years, the receiver collected on these claims \$519.75, and James Nance collected, before the receiver was appointed, \$284.62; making total collections, \$804.37. Deducting 15 per cent., the reasonable expense, as shown, of collecting, and we have remaining \$4.72 more than was paid for them. Green Turner, who was employed by the receiver to collect these claims, or to aid in so doing, who was acquainted with the financial standing of the parties, gives his opinion that the batch was not worth over \$650 when sold; and Amos L. Moody, who was also well acquainted with the parties owing the notes and accounts, agrees with said Turner, that not more than \$40 or \$50 more can be collected; that the parties are poor, and, for the most part, nothing can be made out of them. The evidence is satisfying, without reviewing it, that the defendants paid fair value for these claims.

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It is not insisted that there was any reservation of benefit to Hall in making the sale. Hall himself swears: "In this transaction, I did not receive any personal benefit, other than the payment of my indebtedness. I did not retain a nickel. . . . I honestly owed the amounts I paid. . . . These payments were made according to my design at the time I made the demand for the \$800." Speaking of the entire transaction, he says: "The sale of the goods, notes and accounts, was not made to hinder, delay or defraud any of my creditors, neither was it made to hinder, delay or defraud J. T. Fargason & Co. I honestly owed the parties the amounts I have stated; \$1,521.39 to J. S. Reeves & Co., and \$1,304 to Throne, Franklin, Nance & Adams."

We find no error in the record, and the decree of the chancellor is affirmed.

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113 78

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Indictment for Selling Liquors without License.

1. *Objections to indictment, going to formation of grand jury.*—When the record shows that the grand jurors were regularly drawn and summoned, a mistake of the clerk in transcribing one of their names, as writing *Free* for *Fire*, is not good matter for a plea in abatement to an indictment (Code, §4445); nor is it good matter for a plea in abatement, that the places of absent jurors were supplied by talesmen without an order discharging them.

2. *Same; indorsement of foreman's name, and names of witnesses.*—It is not good matter for a plea in abatement to an indictment, that in indorsing the name of the foreman of the grand jury only the initials of his christian name are given, instead of the full name; nor is it good matter for such plea, that after the indictment was filed in court the solicitor indorsed on it, without leave of the court, and without the consent of the defendant, the names of persons as witnesses before the grand jury.

3. *Testimony of witness not before grand jury.*—In a criminal case, a conviction may be had on the testimony of a witness who was not before the grand jury, and without producing the witness on whose testimony the indictment was found.

FROM the Circuit Court of DeKalb.

Tried before the Hon. JOHN B. TALLY.

The indictment in this case, when returned into court, was indorsed with the name of Rufus Kirkpatrick, as the witness before the grand jury, but the name of John J. Stewart was afterwards indorsed by the solicitor, without the permission

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of the court, and without the consent of the defendant. The defendant filed a plea in abatement on this ground, and on other grounds stated in the opinion. The court struck the plea in abatement from the files, on the ground that it was frivolous, and the defendant excepted. On the trial, the State offered said Stewart as a witness, and the defendant objected to his admission as a witness on the ground stated in his plea in abatement; and the objection being overruled, the witness testified that he had bought whiskey from the defendant within the period covered by the indictment, and at a time different from those to which he had testified in several other cases against the defendant; but that Rufus Kirkpatrick was not present on that occasion, and that he (witness) was not before the grand jury as a witness at the term at which the indictment in this case was found. The defendant moved to exclude the testimony of the witness from the jury, and excepted to the overruling of his motion; and he also excepted to the refusal of the following charge, which was asked by him in writing: "If the jury believe from the evidence that Rufus Kirkpatrick was not present, did not see, and had no personal knowledge of the sale of liquor by defendant to which the witness testified, then they should acquit the defendant."

G. B. DENNISON, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

COLEMAN, J.—The defendant was indicted for retailing spiritous liquors without a license. The defendant filed a plea in abatement, going to the formation of a grand jury which presented the indictment. In writing up the record of the organization of the grand jury, and of those summoned and not attending, the clerk wrote in one place W. J. Free, instead of W. J. Firee, and in another place J. L. Taylor instead of J. L. Hagler. The minutes of the court themselves furnish abundant evidence of the regular formation of the grand jury, and that these were mere clerical errors of the clerk of the court in transcribing the names of the jurors who had been regularly drawn and summoned by the sheriff, as shown by his return into the court, all of which is of record.—*Tanner v. State*, 92 Ala. 1, and authorities there cited.

Section 4445 of the Code of 1886 declares, that "no objection can be taken to an indictment by plea in abatement, or otherwise, on the ground that any member of the grand jury

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was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law," &c. This section has been frequently considered by this court and judicially construed before its adoption into the present Code. In the case of *Billingslea v. The State*, 68 Ala. 486, it was said: "There are but two classes of cases in which objections can be sustained to an indictment, when they are based on irregularities in the organization of a grand jury. *First*, where such jurors were not drawn in the presence of the officer designated by law. *Second*, where there is some order of the court below, or some action of the presiding judge, appearing of record in the cause, and relating to the organization of the grand jury, which is without warrant in the statute, or is contrary to its provisions. This embraces some judicial order or act of the court, as contradistinguished from any act of its officers, while ministerially executing any such order when lawfully made."

The second ground of objection is, that the court made no order discharging those who failed to appear, but supplied their places without first making an order discharging them. The objection is without merit, under the principles decided in *Billingslea v. The State*, *supra*; Crim. Code, page 133, § 9 of Act.

The other objection to the indictment, viz., that it was indorsed R. M. Blevins, foreman, instead of Richard M. Blevins, and that the solicitor endorsed the names of other witnesses on the indictment after it was returned into court, are wholly destitute of merit.

The objection to the introduction of testimony on the trial is equally untenable.—*O'Brien v. The State*, 91 Ala. 25.

Affirmed.

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108	256
99	218
183	60
99	218
143	523

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Attachment for Rent of Store-house.

1. *Contract of rent for one year*—A contract for the rent of premises for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 1732), unless reduced to writing.

2. *Contract of rent by the month*.—A contract of renting by the

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month is not presumed to be for the term of one year, but may be terminated by either party at the end of any month.

3. *Presumption in favor of judgment*—When a case is submitted to the decision of the court without a jury, and the bill of exceptions does not purport to set out all the evidence adduced, this court will presume that there was other evidence which justified the decision.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This action was brought by A. Ullman & Co., suing as a partnership, against R. E. Garner & Co., a partnership composed of R. E. Garner and E. A. Doolittle; and was commenced by attachment sued out before a justice of the peace, on the 30th June, 1892, to recover the sum of \$216.16, claimed to be due from the defendants to the plaintiffs for the rent of a store-house in Attalla for the year 1892. The defendants pleaded the general issue, the statute of frauds, payment, and tender; and issue was joined on these several pleas, a jury being waved, and the cause submitted to the decision of the court. The testimony adduced on the trial is thus stated in the bill of exceptions:

"J. A. Hughes, who was the owner of the premises at the time of the renting, testified that, during the month of December, 1891, he rented the store-house to defendants for the term of one year, from the 1st of January, 1892, at and for the rental of \$400.00 per year, payable in monthly instalments of \$33.33 per month; that defendants went into possession of the store, under said renting, on the 1st day of January, 1892, and paid witness the rent as agreed, up to the 15th of March, 1892, when witness sold the store to plaintiffs.

"A. Ullman, one of the vendees of the premises, testified, that on 15th March, 1892, plaintiffs purchased the store-house from J. A. Hughes; that on the same day witness went to the store-house, and called for defendant, R. E. Garner, who was not in; that witness told E. A. Doolittle, a member of the firm of R. E. Garner & Co., that plaintiffs had bought the store occupied by defendants, and told said Doolittle the terms of the contract, as set out above in Hughes' testimony, as he had been informed of it by Hughes, which Doolittle admitted to be correct, but suggested that henceforth he would prefer to pay the rent on the 15th, instead of the 1st of each month; that he would pay the rent to the 15th of March, to Hughes, and thereafter to witness, to which witness assented; that on the night of July 1, 1892, defendants vacated said store-house, and had their goods placed in cases for shipment, when he attached them for

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rent; that Doolittle refused to pay rent to 15th July, but offered to pay to the 1st, when they vacated, which witness refused to accept; that witness received the keys to the house, by registered letter, two months after the house was vacated; that Hughes transferred his rental lease, as made with defendants, to the plaintiffs, on the 15th March, 1892, the day of their purchase from Hughes.

"R. E. Garner, one of defendants, testified, that on the 19th of December, 1891, he and E. A. Doolittle made a contract with J. A. Hughes for the rent of the store, the rent to begin and possession given on the 1st January, 1892; that the contract was verbal, and the renting by the month, payable on the end of each month, \$33.33; that on the 30th June, 1892, they vacated the store, and moved out in the day-time; and that he never at any time, made any contract with Ullman.

"E. A. Doolittle testified, that he and his partner, Garner, on the 19th of December, 1891, made a contract with Hughes, for the rent of the store by the month; that the renting was to begin 1st January, 1892, rent payable at the end of each month; that on the 15th March, 1892, plaintiff, Ullman, came to the store, and said, 'I'm your landlord.' Witness replied, 'Is that so?' Ullman said 'Yes, I have bought this store from Mr. Hughes, and you may continue on the same as you have been doing'; to which witness replied, 'Very well'; that witness paid Hughes the rent to the 15th March, and then to Ullman to 15th June, and witness never made any contract with Ullman in regard to the renting; that according to his understanding, the contract of renting was for no specified length of time, and that defendants had the right to move out at any time; that defendants vacated the store on 30th June, 1892, in the day-time; that he saw Ullman, before the attachment was sued out, and tendered to him the rent due up to the time they vacated the store, and he refused to receive it; that witness also tendered to him the keys, which he refused to accept, and he afterwards, July 2, 1892, sent them to him by registered letter, and offered in evidence the receipt of the postmaster of that date for keys."

"Whereupon," as the bill of exceptions adds, "the court rendered judgment for the plaintiffs, for \$215.50; to which judgment defendants excepted," and they here assign it as error.

CALDWELL & JOHNSTON, and JAS. D. GARNER, for appellants, cited *Jonas v. Field*, 83 Ala. 445; *Crommelin v. Thies*, VOL. XCIX.

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31 Ala. 412; *Parker v. Hollis*, 50 Ala. 411; *Oliver v. Gold Life Ins. Co.*, 82 Ala. 417; *White v. Levy*, 93 Ala. 484; *Hammond v. Winchester*, 82 Ala. 470.

J. A. BILBRO, *contra*, cited *Southern Suspenders Co. v. Van Borries*, 91 Ala. 509.

HARALSON, J.—Under the evidence set out in the bill of exceptions, alone, whether the account given of the rent contract by the plaintiffs, or that given by the defendants, be true, we might hold that the plaintiffs were not entitled to recover; for, according to the plaintiffs' evidence, the contract was void under the statute of frauds, in that it was not shown to be in writing, and to be performed within a year from the making thereof; and, according to defendants, it was a verbal renting, by the month, which might be terminated at the end of any month; and they had paid or tendered all they owed, up to the date of their leaving, and tendered the possession of the premises to the plaintiffs. *Crommelin v. Theiss*, 31 Ala. 412; *White v. Levy*, 93 Ala. 484.

But the bill of exceptions does not purport to set out all the evidence; and, under the uniform rulings of this court, we must presume there was other evidence introduced, not set out, which was sufficient to sustain the judgment of the City Court.—*Hood v. Pioneer M. & M. Co.*, 95 Ala. 461; 11 So. Rep. 10; *Hunt v. Johnson*, 96 Ala. 130; 11 So. Rep. 387.

Affirmed.

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Action against Foreign Corporation for Statutory License Fee.

1. *License tax on foreign corporations, under statutory and constitutional provisions.*—The statute approved February 18th, 1893, entitled "An act to require all corporations to pay a fee or license for the use of the State before commencing business in the State" (Sess. Acts 1892-3, p. 690), does not apply to or include a foreign insurance company, which was lawfully engaged in doing business here on that day, having fully complied with all the constitutional and statutory provisions then in force regulating the right of foreign corporations to do business in this State. To make the statute apply to such corporations, would extend its provisions beyond the scope and purview of its title.

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APPEAL from the City Court of Montgomery.
Tried before the Hon. THOS. M. ARRINGTON.

WM. L. MARTIN, Attorney-General, for the appellant.—A corporation has its domicile in the State or country of its birth, and is said to be without capacity to emigrate. It can exercise its corporate functions in other States, only so far as it may be permitted by the comity of the local sovereign. It is not a citizen within the meaning of that clause in the Federal Constitution which declares that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The State may prescribe the terms on which foreign corporations may do business within its limits, or exclude them altogether, and it may discriminate against them in favor of corporations of its own creation. In support of these propositions, see *Horn Silver Mining Co. v. New York*, 143 U. S. 305; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110; *Doyle v. Continental Insurance Co.*, 94 U. S. 535; *Bank of Augusta v. Earle*, 13 Peters, 519; Taylor on Private Corporations, § 400; Morawetz on Private Corporations, §§ 970-71; 4 Amer. & Eng. Encyc. Law, 206; 33 Amer. & Eng. Corp. Cases, 1-67. Being a foreign corporation, the defendant is unquestionably within the terms of the statute, and its compliance with the provisions of other laws does not relieve it from the payment of the license. This is expressly declared by the 6th section of the statute. Those provisions, requiring the designation of an agent and a known place of business in this State, are intended for the protection of our own citizens in their transactions with foreign corporations, by securing to them the right to sue in our own courts.—*Nelms v. Ed. Amer. Mortgage Co.*, 92 Ala. 157; *Farrior v. N. E. Mortgage Security Co.*, 88 Ala. 275. Compliance with those provisions does not confer the absolute right to do business here, nor imply that other provisions may not be imposed. The power of the State to revoke such license is well established. *Powell v. State*, 69 Ala. 10; *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 540; *Rowland v. State*, 12 Texas Ap. 418.

TOMPKINS & TROY, *contra*.—To extend the provisions of the act of February 18, 1893, to foreign corporations which were doing business in this State at the time of its passage, and had complied with all the requirements of laws then exist-

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ing, would carry it beyond the scope of its title, and would, to that extent, render it unconstitutional.—Sutherland on Statutory Construction, §§ 210–11; *United States v. Palmer*, 3 Wheat. 610–31; *People v. Abbott*, 16 Cal. 359; *Bishop v. Barton*, 2 Hun. N. Y., 436; *People v. Wood*, 71 N. Y. 371; *People v. Davenport*, 91 N. Y. 574; *People v. Molineux*, 53 Barb. 9; 7 Nevada, 19; *State v. Young*, 47 Ind. 150; *Rushing v. Sebree*, 12 Bush, 198; *Miller v. Jones*, 80 Ala. 49; *Morgan v. State*, 81 Ala. 72; Cooley's Const. Limitations, 177.

STONE, C. J.—This is a suit by the State against a foreign insurance company, and is sought to be maintained under the act approved February 18, 1893.—Sess. Acts, 690–1. The sole question presented for our consideration is the judgment of the City Court, overruling plaintiff's demurrer to defendant's plea in bar. The suit was commenced in May, 1893, and it is averred in the complaint that the defendant, a corporation created by the laws of Connecticut, with a capital stock of \$1,250,000, and "authorized by its charter to engage in the business of issuing policies of fire insurance, did engage in its said corporate business, and did issue policies of fire insurance within the State of Alabama, after the eighteenth day of February, 1893, and has continued to engage, and is now engaged in said business within said State, without having first paid into the treasury of said State, for the use of the State, a fee or license of two hundred and fifty dollars, as required by law." This complaint corresponds with section 4 of the act approved February 18, 1893, if we consider that section without reference to other parts of the statute.

The defense pleaded may be thus stated: That before the enactment of that statute, the defendant, having been previously incorporated and organized under the laws of Connecticut, did comply with all the provisions of section 1200 of the Code of 1886—(they are set out in detail in the plea)—did pay the license fee, \$100, into the treasury of Alabama, and obtained a license from the State Auditor, authorizing it to conduct and transact the business of life insurance in this State until January 15, 1894; and that thereupon, and before February 18, 1893, to-wit, January 1, 1893, "this defendant commenced doing business in the State of Alabama, and was and continuously did business in the State of Alabama up to the said 18th day of February, 1893; and was on said 18th day of February, 1893, doing business in the State of Alabama, and had been for many years prior to said 18th day of February, 1893, carry-

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ing on its business in said State of Alabama, and did not commence carrying on such business after said date."

The precise point of the plea and defense is, that the statute of February 18, 1893, has reference alone and exclusively to corporations which should thereafter *commence* doing business in the State of Alabama, and that it does not and can not apply to corporations which had commenced business before the statute was enacted, and were engaged in business at the time of the enactment. This defense is rested on the title of the act of February 18, 1893, which is in the following language: "An act to require all corporations to pay a fee or license for the use of the State before commencing business in this State."

The Constitution of Alabama, Art. IV, § 2, declares that "Each law shall contain but one subject, which shall be clearly expressed in its title," with certain exceptions not pertinent to this case. That section has been many times considered and very fully discussed by this court. Our uniform interpretation has been, that the clause is mandatory; and that if a statute embodies any matter, which is not germane to and embraced in the title, such clause must be pronounced unconstitutional. We deem it unnecessary to repeat the arguments. They are fully set forth in the following decisions, and in the many authorities therein referred to: *Ballentyne v. Wickersham*, 75 Ala. 533; *Lowndes County v. Hunter*, 49 Ala. 507; *Stein v. Leeper*, 78 Ala. 517; *Miller v. Jones*, 80 Ala. 89; *Ramagnano v. Crook*, 85 Ala. 226; *Ex parte Reynolds*, 87 Ala. 138; *Montgomery v. State*, 88 Ala. 141; *Ex parte Cowert*, 92 Ala. 94.

It will be observed that the title of this act uses the word "commencing," present participle of the verb to commence. The definition of the verb to commence is, "To cause to begin to be; perform the first act of; enter upon; begin." Century Dic. "To begin; to originate; to do the first act in any thing; to take the first step."—Webster Dic. Each of these definitions shows that the title of the statute we are considering is clearly inappropriate to a business already begun and in continuing operation. It must and does relate to a business thereafter to be entered upon.

The first three sections of the act of February 18, 1893, refer in terms to Alabama corporations to be organized after the enactment of the statute. They could not by any straining be made applicable to corporations then existing. These are clearly within both the letter and the spirit of the title of the act. The fourth section of the statute is in the following language: "No corporation created by the laws of

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any other State, or any foreign country, shall hereafter carry on any business in this State without first having paid into the treasury of this State, for the use of the State, like fees as those required of corporations organized under the general incorporation laws of this State, by the first section of this act." The natural import of this language, considered by itself, is that it embraces foreign corporations then doing business in the State, and proposing to continue to do such business. This, however, would make this clause of the statute unconstitutional, because neither expressed nor embraced in the title of the act. It is our duty, in interpreting legislative enactments, to presume there was an intention to conform to the Constitution; and to so construe any doubtful word or clause as to make it constitutional, rather than to make it unconstitutional by a contrary interpretation. Thus construing section four of the act under consideration, we hold that the intention was to make it operative upon foreign corporations thereafter to commence business in Alabama, and not to such as were already doing business within the State. To thus construe it brings section four clearly within the purview of the title of the act, while the construction contended for by appellant would make it unconstitutional.

The judgment of the City Court is Affirmed.

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105	120
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117	161
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121	48

Application for Discharge from Custody on Habeas Corpus.

1. *Misdemeanors triable before justice of the peace; trial or commitment by him.*—When a person is brought before a justice of the peace, charged with a misdemeanor which the justice has jurisdiction to try and determine on its merits, the prosecutor and the witness also being present, it is the duty of the justice to proceed with the trial and render final judgment (Code, § 4239); and he has no power to bind the defendant over to answer an indictment, unless a trial by jury is demanded.

Application by petition in the names of Richard Pruitt and Thomas Harper jointly, for the writ of *habeas corpus*, to procure their discharge from the custody of the sheriff and jailor of Madison county, who held them under a *mittimus* issued by a justice of the peace of said county, under the

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circumstances stated in the opinion. The application was first made to Hon. HENRY C. SPEAKE, the judge of the eighth judicial circuit, and was by him overruled and refused; and a bill of exceptions having been reserved to his decision, the petitioners renew their application to this court.

D. D. SHELBY, and S. S. PLEASANTS, for the petitioners, cited Code, § 4026; *In re Donnelly*, 30 Kans. 424; *In re Donnelly*, 30 Kans. 191; *Thomm v. State*, 35 Ark. 327; 12 Amer. & Eng. Encyc. Law, 410, note.

WM. L. MARTIN, Attorney-General, *contra*, cited 1 Bish. Crim. Pro., 141, § 237; *Com. v. Harris*, 8 Gray, (Mass.) 470; *Com. v. Boyle*, 14 Gray, 3; *Com. v. Golding*, 14 Gray, 49; *Com. v. Many*, 14 Gray, 82; *Com. v. Hamilton*, 129 Mass. 479; *State v. Towle*, 48 N. H. 97; *Wolverton v. Com.*, 75 Va. 909.

MCCLELLAN, J.—Petitioners were arrested and brought before a justice of the peace on a charge of removing seed-cotton, of the value of five dollars, from the premises of J. M. Hampton, between the hours of sunset and sunrise. The complaint was made before this justice, and the warrant thereon was issued by him. The prisoners being brought before him, he examined witnesses touching the alleged offense, and thereupon made the following order: "State of Alabama, Madison County. In the case of Thomas Harper and Richard Pruitt, they are committed to jail to answer the charge of removing seed-cotton from the premises of John M. Hampton. The amount of bond at the rate of \$500 each." Failing to give the required bail, the defendants were committed to jail under the following *mittimus*: "*State of Alabama v. Thomas Harper and Richard Pruitt*. To the jailer of Madison county, Alabama: In the case of the *State v. Thomas Harper and Richard Pruitt*, charged with grand larceny, upon the examination I find that such offense has been committed, and have sufficient cause to believe them guilty of the same. You are therefore commanded to take them into your custody, and keep them till they are legally discharged. I fix their bond at five hundred dollars each, to appear at the next term of the Circuit Court. Witness my hand and seal, this the 2d day of November, 1892. J. B. SMITH, J. P." In answer to the writ of *habeas corpus* issued by the judge of the Circuit Court, the sheriff of Madison county justified his custody of petitioners under this *mittimus*. On this state of case, the

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circuit judge denied the petition, and remanded the petitioners to custody.

The offense charged in the complaint and described in the order of commitment made by the justice is a misdemeanor. Code, § 4141. It is manifested by the complaint, the order of commitment, and the evidence of the justice of the peace, given without objection on the hearing of the petition, that the petitioners were committed to answer an indictment for this misdemeanor, and that it was this offense which is in fact, through misconception of the magistrate, described in the *mittimus* as grand larceny. And hence we feel warranted in affirming that, on the hearing of the petition by the circuit judge, it was made to appear, and is made to appear by the record before us, that the petitioners were committed in default of bail to answer an indictment for a misdemeanor. Under general statutes, justices of the peace have concurrent final jurisdiction with Circuit Courts of certain specified misdemeanors (Code, § 4233), when the prosecution therefor is commenced within sixty days after the commission of the offense. Code, § 3712. By special enactment, the concurrent final jurisdiction of justices of the peace in Madison county is extended to all misdemeanors.—Acts 1876-7, p. 196. This prosecution was commenced the day after the alleged commission of the offense. The justice therefore had jurisdiction to finally hear and determine it, adjudge guilt or innocence, and impose punishment or discharge the defendants. The statute expressly declares and fixes his duties and powers in respect of such cases with clearness and emphasis. Saving defendant's constitutional right to a jury, if he elects to claim it, it provides that, if he does not demand a jury—and there is no pretense that these defendants made such demand—the trial *must proceed*, either presently or on a day to which a continuance may be had for good cause shown, *before the justice*. This is its language: "If the accused and the prosecutor are both present, and also the witnesses for the prosecution and defense, and the accused does not demand a trial by jury, the trial must proceed before the justice, unless, for good cause shown, he continues it to some other day not more than ten days distant."—Code, § 4239. The trial referred to in this section is not a preliminary one, but final. A previous section is clear to this conclusion. It provides: "In all trials before a justice of the peace, of causes which are within his jurisdiction, he must determine both the law and the facts, without the intervention of a jury, and award the punishment which the offense may demand."—Code,

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§ 4237. These sections are parts of the article of the Code which specially prescribes the duties, powers and jurisdiction of justices of the peace in prosecutions for misdemeanors, and the proceedings therein. Code, §§ 4233, *et seq.* And they are the source and limitation of all power, authority and jurisdiction in these officers, in respect of the misdemeanors named in section 4233, and, in connection with the special act referred to above, in respect of all misdemeanors committed in Madison county. The sections which we have set out *in totidem verbis* are as imperative and mandatory in their terms as language, without express exclusion, could make them. They leave no room for discretion. And there is every reason why they should not. The organic law guarantees a speedy trial. It is the policy of this law that a speedy trial shall be had. It is equally to the interest of the public and alleged misdemeanants that the question of their guilt or innocence should be speedily adjudged, to the end that if guilty they may the sooner pay the penalty, and if innocent the sooner be so adjudged and discharged, in either case avoiding expense, and in cases like this avoiding incarceration amounting, it may be, to greater punishment than the law has set against the crime; and this too without any adjudication of guilt upon which the law authorizes the infliction of punishment by that name. In such cases, the justice, the statute declares, *must proceed* with the trial—he *must* determine both the law and the facts, and he *must* award the punishment. These duties are imposed for the benefit of defendants, as well as upon other general public considerations. They vest defendants with the right to have their causes finally heard and determined by the justice. As is fully illustrated in this case, it is a valuable right, and, by the very terms of the statute, it must be accorded to them, unless they elect to exercise another right, which is no more valuable and assured to them than this is, so long as these statutes are unrepealed—that of demanding a trial by jury. This right, as in the case at bar, being waived, the only other way to carry the case to the Circuit Court is by appeal after final judgment by the justice, a judgment which has never been entered here, and now can not be. We hold, therefore, that there was no warrant of law for sending this case to the Circuit Court. The justice of the peace was without authority or jurisdiction to bind these petitioners over to that court, and, in default of bail, commit them to await the action of its

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grand jury. His *mittimus* to that end is void, and affords no justification for their detention.

The argument against this conclusion is based on the provisions of the general law made to apply in broad terms to all magistrates named in section 4680 of the Code, among which are justices of the peace, and authorizing these officers to hold a preliminary investigation upon complaint made that "a person has been guilty of a designated public offense," and bind such person over to a court having jurisdiction thereof, if it be made to appear that the offense has been committed, and that there is probable cause to believe the defendant is guilty thereof.—Code, §§ 4255, *et seq.*, and 4680. Upon a well settled and familiar principle, this general law, applying to all magistrates and to all offenses in general terms, will not be allowed to override specific and imperative enactments specially, and for obvious reasons, applicable to justices of the peace and prosecutions for offenses of a particular class finally triable and determinable by them; and especially ought this rule to be applied here, since it still leaves a field for the operation of the general statute in respect of justices of the peace, in that under it they have jurisdiction preliminarily to try, and commit or discharge, all alleged felons, and all misdemeanants who have not been proceeded against within sixty days after the commission of the alleged offense.

A good many adjudged cases have been brought to our attention, cases decided in other jurisdictions. It does not appear that any of them had to deal with statutory provisions similar to those embodied in sections 4237, 4238 and 4239 of our Code, and hence they can not be said to be authority in the present case. Among them is the case of *Ex parte Donnelly et al.*, 30 Kan. 191, and (on rehearing) 424, where it was directly held that a justice of the peace could not commit for an offense of which he had final jurisdiction, and this though, so far as the report of the case discloses, justices had preliminary jurisdiction under a general law identical in terms with our own, and it did not appear that their duties, power and jurisdiction in respect of misdemeanors were specifically prescribed as in our statutes. The conclusion of the Kansas courts was in some measure rested on a consideration which we have not before adverted to, but which is equally forceful under our statutes. It is this: A committing magistrate is, in general terms, authorized to bind defendants over to any court having jurisdiction of the offense. To hold that a justice of the peace could

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bind over a misdemeanant of whose offense he has final jurisdiction, is to hold that he may upon the statutory preliminary trial—upon an examination of witnesses—recognize such offender to appear before another justice of the peace, or even for another and final trial before himself, which is an absurdity.

We need not pursue the discussion further. The application for *habeas corpus* will be granted, and the writ will be here issued, unless, upon the advice of this opinion, petitioners are content to renew their application before a *nisi prius* judge having jurisdiction.

Application granted.

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Action for Breach of Special Written Contract.

1. *Damages for breach of contract to lend or advance money.*—Under a written contract by which defendants agreed to sell and convey to plaintiff a vacant lot, and to advance to her \$300 to build a house on it; \$150, about one-fourth part of the agreed purchase-money, being payable in advance, and the residue in monthly installments of \$8.50, which was also agreed on as the "monthly rental value of the premises," although the vacant lot had no rental value whatever; defendants having become insolvent, and made an assignment for the benefit of their creditors, after receiving the cash payment and several monthly instalments; *held*, that plaintiff could recover only nominal damages for their failure to advance the \$300 to build a house, and could not be allowed to prove, as affecting the question of damages, that the value of the vacant lot was much less than the agreed price.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN R. TYSON.

W. A. GUNTER, for appellant.

TOMPKINS & TROY, and H. STRINGFELLOW, *contra*.

HARALSON, J.—This suit is for the breach of a contract, the substance of which, so far as necessary to recite it, was that the defendants, Moses Bros., agreed to sell to the plaintiff, Carrie Gooden, a certain lot of land in the city of Montgomery, at the price of \$622.50, one hundred and fifty dollars of which plaintiff was to pay, and did pay in cash,
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and the balance was to be paid in monthly instalments of \$15.00 each, with interest; and defendants, on the full payment of the purchase-money, were to give to plaintiff a warranty deed to the property. The contract contained the provision, also, that if plaintiff failed to pay said instalments of deferred payments of the purchase-money, the defendants should have the right to annul the contract, take possession of the lot, and retain out of the money paid \$8.50, as rent per month up to the date of forfeiture, returning the surplus, if any, to plaintiff. The sum of \$8.50 was "agreed and declared by the parties to be the monthly rental value of the premises." The plaintiff agreed to keep the property insured for the benefit of the defendants. After all the foregoing, and some other stipulations, comes the following and final clause of the contract: "And it is agreed between the parties to this agreement, that the parties of the first part [defendants] will advance three hundred dollars to build a house, the said party of the second part [plaintiff] obligating herself to repay the said amount as the lot is paid for, and to keep the building insured." The breach assigned was the defendants' failure to advance the \$300 as agreed.

On the trial, the contract was introduced in evidence by the plaintiff, and she proved that she had complied with her part of it; that the lot was a vacant one, suitable only for a dwelling-house, and that, unimproved, the rental value of the lot was nothing; that she took a carpenter to defendants, with estimates for a \$300 house, and defendants said the estimates were too high, and they would get their carpenter to put up a house for that sum, but had never done so, nor advanced her any part of the \$300 they agreed to lend her, though often requested to do so, before the commencement of this suit; that the defendants, after the making of said contract with plaintiff, had failed, become insolvent, and made a general assignment for the benefit of their creditors, including the contract of the plaintiff, and that she has, since said assignment, been making payments for the purchase of said lot to their assignees. The plaintiff offered to prove the value of said lot, at the date of said contract for sale, and its present value; but the court, on objection of defendants, would not allow the proof, and plaintiff excepted. The court, on the foregoing state of the proof, charged the jury, at the request of the defendants, "That in this case the plaintiff was entitled to recover only nominal damages;" to which charge the plaintiff excepted; and it is on these reservations of exceptions that errors are here assigned.

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There was no evidence that plaintiff made any effort to borrow from any other person the sum defendants agreed to advance to her, or that she could not, for any reason, have borrowed it, if she had made the effort to do so. Nor was there any evidence of what would have been the rental value of the lot, if it had been improved by the erection on it of a three hundred dollar house. The contract does not show that fact. It fixes the arbitrary sum of \$8.50 as the agreed value of the monthly rental to be paid by plaintiff, in case she forfeited her contract, and this, without reference to whether the lot was improved or unimproved, and, as may be supposed, as a stimulus against the forfeiture by plaintiff. We refer to this lack of evidence, to show that if plaintiff's contention in the case was conceded, namely, that the measure of damages for a failure by defendants to lend this money is the difference between the rental value of the lot, improved and unimproved, there is no evidence on which to base such an estimate of recovery.

The rule is a familiar one, that the damages which are recoverable for the breach of a contract, must always be the natural and proximate consequence of the injury complained of; which rule excludes the idea of such damages as are merely consequential, remote or speculative, and limits a plaintiff's recovery, in actions *ex contractu*, to a just compensation for the actual loss which he has sustained by the defendant's failure to comply with his promise.—2 Greenl. Ev., § 256; *Trustees of Howard College v. Turner*, 71 Ala. 433; *Clements v. Beatty*, 87 Ala. 239; *Howard v. Taylor*, 90 Ala. 241.

The difference of damages for the breach of a contract for the sale and delivery of merchandise, and the breach of one for a failure of a party to advance or pay the money he agreed to lend another, is, on principle, the same, and scarcely distinguishable. The lending of money is as much of a business, as generally carried on, as the selling of goods. Generally, and except as modified by special circumstances, in the case of a contract for the sale and delivery of ordinary merchandise at a certain place, in a certain time, and at a certain price, the amount of damages that can be recovered for its breach is, the difference between the contract price and the market price of the same class of goods, at the time and place of delivery; because this enables the plaintiff to make himself whole, without any pecuniary loss, by going into the market and supplying himself with the same class of goods, at the same or a different price. Of course, the seller would be liable for any difference in the

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price at which the goods were contracted to be sold, and at which they might be supplied. If, for any reasons, the purchaser may not thus protect himself from loss, the reason of the rule ceases, and can have no application.—*Bell v. Reynolds*, 78 Ala. 511; *Rose v. Bozeman*, 41 Ala. 678; *Wood on Damages*, § 12, p. 15.

Another well recognized principle is, that when one is injured by the breach of a contract by another, he is bound to protect himself, if he can do so, with reasonable exertion, or at trifling expense, and can recover of the delinquent party only such damages as he could not, with reasonable effort, have avoided.—*Ala. Iron Works v. Hurley*, 86 Ala. 219; *Culver v. Hill*, 68 Ala. 70; *Strauss v. Mertief*, 64 Ala. 299; *Miller v. Mariner's Church*, 20 Am. Dec. 341; 1 Sedg. on Damages, § 201.

The least damages that can be allowed for a clear breach of a legal duty are nominal damages, which are always recoverable, when such a breach is shown, and no special damages are proved.—*Bagby v. Harris*, 9 Ala. 173; *Adams v. Robinson*, 65 Ala. 586; *Trustees Howard College v. Turner*, *supra*. We conclude, therefore, that under ordinary circumstances, the damages for the breach of a contract to lend money can not be more than nominal.

The rate of interest on loans is fixed by law. If one contracts to lend it at a less rate than that fixed by law, and he fails to comply with his contract, and the other party has to borrow it elsewhere, and pay a greater rate, he may recover of the party violating the contract, the difference between the rate at which the money was agreed to be lent, and the rate he, the borrower, had to pay, inside the legal rate. 2 Sedgwick on Damages, § 622; *Thorpe v. Bradley*, 75 Iowa, 50; *Luce v. Hoisington*, 56 Vt. 436.

As as been stated, there is an absence of evidence to show, that the plaintiff might not have protected herself from loss without more than nominal damages to defendants. This, she was bound to do, if she could.

The evidence sought to be introduced and excluded was irrelevant; and there was no error in the charge of the court to the jury.

Affirmed.

[Beal v. The State.]

Beal v. The State.*Indictment for Defamation.*

1. *Bill of exceptions not signed within agreed time.*—When a bill of exceptions is not signed in term time, nor within the time specified by written agreement (Code, § 2761; p. 610. note), it will be struck from the record on motion; but, if it was presented to the presiding judge within the extended period, and he failed or refused to sign it, it may be established in this court as by law provided.

2. *Defamation; constituents of offense.*—To authorize a conviction for defamation (Code, § 3773), the accusation must have been falsely and maliciously made; but the jury may infer malice from the character of the accusation and the want of probable or reasonable grounds for making it.

FROM the Circuit Court of Calhoun.

Tried before the Hon. LEROY F. BOX.

INZER & CALDWELL, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

COLEMAN, J. —The defendant was convicted of the offense of defamation. There is a motion to strike from the record the bill of exceptions, because not signed within time. Sixty days were agreed upon in writing as the time within which the bill of exceptions might be signed. This agreement bears date May 10th, 1892. The bill of exceptions has two indorsements, signed by the judge who presided at the trial. The first is "Received by me, through mail, at Ashville, July 9th, 1892." The second is, "Bill returned to defendant's counsel at his request, and afterwards, to-wit, August 18, '92, again sent to me through the mail." The bill of exceptions bears date Nov. 3d, 1892. It is evident the bill bears date long after the time had expired, within which it should have been signed.

The statute fixes the time within which a bill of exceptions must be signed, and regulates the manner in which the time may be extended. Unless the statute is complied with, and the bill of exceptions is signed as therein provided, we can not consider it on appeal in this court. See Act of Feb. 22, 1887, p. 126, bottom of page 610 of the Code. *Rosson v. State*, 92 Ala. 76; *Powell v. Sturdevant*, 85 Ala. 243.

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It is manifest that the judge had no authority in the present case to sign the bill of exceptions, at the time it was signed. There had been no order or agreement made by which the time had been extended beyond the sixty days agreed upon.

Having failed to sign the bill within the sixty days, if the appellant was free from fault, he should have proceeded to establish the bill of exceptions in this court, as provided in the statute. The motion to strike the bill of exceptions must prevail, and this order leaves the appellant without an exception, and we are powerless to revise the ruling of the court, in its refusal to charge the jury as requested by the defendant. Under the circumstances, probably it is best to construe the statute, under which the defendant was prosecuted.

Section 3773 of the Code, under which the indictment was presented, declares, that "Any person who speaks, writes or prints, of and concerning another, any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense, involving moral turpitude, must on conviction," &c. To constitute the offense, the accusation, whether spoken, written or printed, must have been "false and malicious;" and to authorize a conviction under this statute, it is necessary to satisfy the jury, beyond a reasonable doubt, that the accusation was false and malicious. The State is not required to show under this statute, by direct proof, that the defendant entertained ill-will or hatred towards the person against whom the accusation was made, or a purpose to injure him. The jury may infer malice from the character of the accusation and the absence of probable or reasonable grounds for making it—*Haley v. The State*, 63 Ala. 83. The prosecutor could ask for an explanatory charge, or the court of its own motion might very properly explain the definition of malice, as intended by the statute, without committing any error; but there can be no violation of the statute, unless the accusation was falsely and maliciously made.

Affirmed.

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Dollar v. The State.

Prosecution for Selling Liquor to Minor.

1. *Argument of counsel to jury.*—In argument to the jury in a criminal case, counsel should not be restricted by a narrow or rigid rule, but should be allowed reasonable license in discussing the evidence and inferences to be drawn from it, but should not be allowed to state, as fact, that of which there is no evidence, and which would not be relevant evidence if offered; and if counsel are allowed to exceed this limit, against the objection and exception of the defendant, in a matter which may prejudice, it is reversible error.

2. *Same.*—On a prosecution for selling liquor to a minor, it is not permissible for the solicitor to state to the jury, against the objection and exception of the defendant, that their town is worse cursed with the illegal sale of whiskey than any other place known to him, that they are trying to build up a school there, and that parents will not send their children to school in a place where they can get whiskey at every corner; but, the defendant's counsel having commented on the fact that solicitor's fee on a conviction for selling liquor to a minor was five times as great as on a conviction for selling without a license, the solicitor may state, in reply, that he would willingly "give up all of his fees in the liquor cases if he could put down the accursed traffic."

FROM the County Court of Shelby.

Tried before the Hon. JNO. S. LEEPER.

Two exceptions only were reserved by the defendant in this case on the trial, each of which was to the overruling of his objections to remarks made by the solicitor in his closing argument to the jury. The first of these exceptions is stated in the opinion of the court, and the other is thus stated in the bill of exceptions: "The defendant's counsel having stated, in his argument to the jury, that they could not convict the defendant of the simple offense of selling liquor without license, as he was not charged with that offense, but for selling to a minor, and that the punishment was different, and the solicitor's fees were different (\$7.50 in the former, and \$37.50 in the latter); thereupon the solicitor, in his closing argument to the jury, said: 'If I could put down the accursed traffic in this place, I would give up all my solicitor's fees in all the whiskey cases, if I could enforce the law in all the cases.' The defendant objected to this statement of the solicitor, and moved to withdraw it from the jury, on the ground that there was no evidence of any other whiskey cases in the court, and no evidence that the

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accursed traffic existed in Columbiana, and the remarks were calculated to prejudice the minds of the jury against him," and he excepted to the overruling of his motion.

BROWNE, McMILLAN & LEEPER, for appellant.

WM. L. MARTIN, Attorney-General, for the State.

HEAD, J.—Appellant was prosecuted and tried for selling liquor to a minor, contrary to the statute. The evidence of the State tended to show that defendant sold the minor a pint of whiskey in Columbiana, Shelby county, within twelve months before the beginning of the prosecution. The solicitor, in his closing argument to the jury, used the following language: "I don't know why it is, but Columbiana is worse cursed with the illegal sale of whiskey of any place I know of. Columbiana is trying to build up a school here, and who do you suppose would send his children to school in a place where there is a grog-shop on every corner where they could get whiskey?" The defendant objected to these statements, on the grounds that there was no evidence to support them, and that they were calculated to prejudice the minds of the jury against the defendant; and moved the court to withdraw them from the jury. The court overruled the objection and motion, and the defendant excepted.

We do not think a narrow or rigid rule should be laid down in restraint of the argument of counsel. Observation and experience show that jury trials rarely occur wherein counsel, in the zeal of discussion, are not led to indulge impertinent remarks, the expression of personal opinions, and often to draw illogical and improper deductions from the evidence. It often occurs, too, that counsel differ as to the testimony of witnesses, each insisting upon his recollection or version of facts which have been deposed to. In the interest of the ending of litigation, a wide range must be given to the arguments of counsel, and much must be left to the good sense and sound judgment of the jury, who will ordinarily be able, under proper instructions from the court, to give proper consideration to what has been said, and not suffer themselves to be influenced by outside and irrelevant matters, and improper opinions and conclusions, drawn into the discussions before them. But there should be a limit placed upon this license. Counsel should not be permitted by the court, against the objection of the opposite party, to state as fact that of which there is no evidence

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whatever, and particularly that which is irrelevant to his adversary's cause, and of which no evidence would have been received if offered, if the facts so stated are of such a character as that they are well calculated to impress the minds of the jurors, or some of them, to the injury of the opposite party.

In the present case, the defendant was on trial for the single act of selling liquor to a minor. The gravity of his offense, and the punishment he should suffer, were to be determined by a consideration of his act in making this sale, and the circumstances which immediately bore upon that act in view of the evils which the law denouncing the offense intended to remedy. It was not proper to be considered, in determining his guilt and punishment, whether Columbiana was worse cursed with the illegal sale of whiskey than any other place known to the solicitor, or that Columbiana was trying to build up a school, or that there was a grog-shop on every corner where children attending the school could get whiskey; yet the solicitor was permitted to state these things of which there was no evidence, and could have been none, as facts to influence the jury, either in ascertaining the guilt of the defendant, or in awarding his punishment. We think they went beyond the domain of legitimate argument, so far as that the defendant was probably prejudiced by them.

We do not mean to say that the solicitor may not comment upon the evils generally of the crime which the law he is seeking to enforce intends to prevent; but he goes beyond this when he gratuitously states to the jury, as facts, the existence of particular evils, in the locality of defendant's offense, and to which that offense is supposed by him to be related. The defendant's guilt must be determined by the facts touching the particular act with which he is charged, and, as we have said, his punishment must be determined by the nature of the act committed, and a consideration of the evils generally resulting from the commission of such acts, within the limits prescribed by law.

The other remarks of the solicitor, to which objection was made, seem to have been called forth by impertinent comments of defendant's counsel in reference to the fees of the solicitor, and do not constitute cause of reversal.

For the error mentioned, the judgment must be reversed and the cause remanded.

[Parker v. Parker.]

Parker v. Parker.

Bill in Equity for Settlement of Partnership Accounts and Administration.

1. *Parties to bill for settlement of administration.*—Infants are necessary parties to a bill which seeks a settlement of the administration of the estate of an intestate of which they are distributees, or the accounts of a partnership of which he was a member, the surviving partner being his administrator.

2. *Partnership property on dissolution by death.*—On the dissolution of a partnership by the death of one of the partners, the title to the personal assets devolves on the survivor, first for the payment of debts, and the residue for distribution among the next of kin; and the title to the real estate vests in the heirs, subject in equity to be converted into partnership assets, and used for partnership purposes.

3. *Non-joinder of necessary parties.*—The non-joinder of necessary parties is available on error, or the objection may be taken by the court *ex mero motu*.

4. *Guardian ad litem for infants; allowance for solicitor's fees.*—When infants are necessary parties to a chancery suit, their interests can only be represented by a guardian *ad litem*, and a person who has an adverse interest to them, however slight, can not properly act as guardian *ad litem*; and when they are not properly represented by a guardian *ad litem*, an allowance for solicitor's fees, for services rendered them, is improper and erroneous.

5. *Improvements erected by surviving partner on partnership property.* If the surviving partner erects valuable improvements on real estate which belonged to the partnership, the respective interests of himself and the heirs of the deceased partner in the property may be ascertained and determined in a suit for a settlement of the partnership accounts, without a partition of the property; and he can not charge the heirs with their share of the expenses incurred in making the improvements, in the absence of an express agreement on their part, or such a course of dealing as evidences an implied agreement.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 21st of February, 1890, by Mrs. Lancy J. Parker against H. Z. Parker, who was the father of Stephen D. Parker, complainant's deceased husband, and also the administrator *de bonis non* of his estate; and sought a settlement of his administration, and also of the accounts of a partnership which had existed between him and said S. D. Parker, under the firm name of H. Z. Parker & Son. The facts of the case were thus stated by HARALSON, J.:

"The bill alleged that complainant had been twice mar-

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ried, the first time to Stephen D. Parker, who died intestate in July, 1886, leaving four minor children, whose names and ages are given, the youngest being eight years old, and the oldest, fourteen, and the last time to W. F. Parker, the present husband; that her first husband, Stephen D. Parker, at the time of his death, and for a number of years before, was a partner with his father, the defendant, who conducted a mercantile business in the town of Ozark, in said county of Dale, under the firm name of H. Z. Parker & Son, and that they did a large and successful business; that upon the death of her said husband, on her application, she was appointed by the Probate Court of said county, and became the administratrix of the estate of her said deceased husband, but that the defendant was her trusted adviser, and attended to all the business for her, about which she knew but little, and was administratrix really, only in name. She further represents, that when she married the second time, she did so in opposition to the advice and wishes of her own and her husband's family, and they advised her to resign the administration of her former husband's estate; that accordingly she filed her statement for a settlement, prepared for her by the defendant, and resigned the administration; that she consented, and the defendant became the administrator *de bonis non* of said estate, and the guardian of her minor children, and since then she knows nothing about the business of the estate; that in December, 1889, the defendant made a partial settlement of his administration, which purported to show all the assets of the estate, but it was a very unsatisfactory statement to complainant. She avers, that the defendant is an old man, and is incapable of managing the affairs of the estate; that he seems to take no interest in the business; that he has an extensive business of his own, which he neglects, and knows and cares nothing for the disbursements of the estate of her husband; that its management is intrusted to strangers; that he has failed to account for the property on the inventory and appraisement; that as surviving partner of H. Z. Parker & Son, he has failed to settle the copartnership business, which is so connected with the estate as that the aid of a court of chancery is necessary to finally settle the administration of said estate.

"The prayer of the bill is, 'that the said H. Z. Parker, administrator, be made a party respondent to this bill of complaint; that he be required to come into this honorable court and settle the affairs of said estate; that he be required to state an account between himself and the decedent, as partners, and, also, that he be required to

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state his account as administrator of said estate; . . . and upon a final hearing, the settlement being completed, oratrix prays that said Parker be removed as administrator and guardian as aforesaid, and that oratrix or some other person, who, to your Honor may seem capable and trustworthy, and to have the interest of the distributees at heart, be appointed in his stead; and for all such other and further, general and special relief, as the facts in the premises may warrant.'

"Process was prayed against the said H. Z. Parker as administrator, alone, and as such he is the only defendant to the bill. The minor children and heirs of said Stephen D. Parker are not parties, either as complainants or defendants. No process was prayed against them, none was ever issued and served, so far as appears, and no guardian *ad litem* appointed for them. And yet, there appears in the record what purports to be an answer to the bill, filed by J. D. Bailey, 'guardian *ad litem* for the above named heirs.' He never appeared in the court again, so far as appears, either in person or by attorney, except to file a written motion in behalf of the minors, as their guardian *ad litem*, to have a credit claimed by the complainant, for a \$500 investment in railroad stock, disallowed.

"The defendant answered the bill, admitting the copartnership, giving the terms of it,—contrary to the allegations of the bill,—which the evidence afterwards showed to be correct; admitting the allegations of the bill as to the administrations of said estate, of his connection with the business of the estate and copartnership, but denying that he had neglected either, or that either had been mismanaged; that he proceeded promptly to wind up the affairs of the copartnership, and to collect its assets, and to that end, the goods and assets of the firm on hand, at the death of his son, were inventoried and appraised at their value; and under the orders of the court, the goods were sold, and he purchased them, at their appraised value, and he was ready and willing to settle in the court under the bill, as surviving partner and administrator. For purposes unnecessary to state, other allegations were made, and the answer was prayed to be taken as a cross-bill. The complainant answered it as such.

"It appeared in evidence that the partnership owned several parcels of real estate, and among them the store-house and lot on which they did business in the town of Ozark. The evidence tends to show, that J. W. Brooks conveyed that property to H. Z. Parker & Son by deed, on the 11th Dec., 1878; and it is stated that the complainant introduced the

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deed in evidence, but it nowhere appears in the record. It also further appears that, after the death of Stephen D. Parker, the defendant procured the complainant, in consideration of \$250, to execute a deed to him of her husband's interest in the lot, but for what purpose, or on what authority, is not shown; and it is stated that complainant offered that deed, also, in evidence, but it is not to be found in the transcript. The proof tends further to show that H. Z. Parker paid \$500 for the firm, out of his own means, for this property, and that the deceased partner never paid any part of it. After the death of the deceased, it is shown, without conflict, that H. Z. Parker erected on the lot belonging to the firm a brick building, used for a hotel above, with two stores beneath, at a cost of \$7,500, which was paid out of his own means; and for this sum, he seeks to be reimbursed out of the partnership assets, if the property is not adjudged to be his. Much evidence was taken on both sides, and the transcript is voluminous.

"The chancellor, on final hearing on pleadings and proof, rendered four decrees, which are assigned, separately, as being erroneous. The first was a decree taking jurisdiction of the settlement of the estate of said intestate, Stephen D. Parker, and ordering a reference to the register, requiring him to state an account on final settlement of the partnership of H. Z. Parker & Son with H. Z. Parker as surviving partner, and requiring said Parker to file with the register, within 30 days, his account and statement for such final settlement, with instructions appropriate for the proper statement of such account. It was further ordered that, "as soon as the report of the register hereinbefore ordered in regard to the partnership of H. Z. Parker & Son shall be filed and confirmed, that said H. Z. Parker, as administrator of the estate of S. D. Parker, deceased, is hereby required to file with the register of this court his account and vouchers for a final settlement of the same," and that the register proceed thereupon, to audit and state said account on final settlement of said estate. The other decrees were those which passed upon the reports of the register, and the final decree settling the partnership accounts between the defendant and the estate of his deceased partner, and of final settlement and distribution of the estate of said Stephen D. Parker."

W. D. ROBERTS, and M. SOLLIE, for appellant.

BORDERS & CARMICHAEL, *contra*.

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HARALSON, J.—The assignments of error are so general, and the transcript so voluminous, that one would hardly ascertain in what the alleged errors consisted, except for the fact, that the appellant's counsel have called attention to them in the brief they have filed.

The fact seems to have been overlooked by the court and counsel on both sides, that the infant distributees of the intestate, whose estate the bill in this case was filed to settle, have not, as complainants or defendants, been made parties to the suit. The complainant filed the bill, as one would suppose, more especially in the interest of her children, as, together, they were more largely interested than she. They owned four-fifths of the assets of the estate of their deceased father, when finally settled; and the lands of the intestate,—the estate being solvent,—descended to them, subject only to the widow's dower, if she was entitled to any. On the death of the deceased partner, the firm of which he was a member was *eo instanti* dissolved, and one of the consequences of the dissolution by death was (subject to well defined limitations) that the distributees, as to the personal assets, became joint owners, and the heirs, as to the realty, became tenants in common with the surviving partner.—Story on Part., § 346. The title to the personal assets, in a case of the kind, devolves on the survivor, to be used for the purpose of paying the debts of the partnership, and thereafter, for distribution among the representatives of the deceased; but the title to the real property of the firm devolves on the heirs of the deceased member, subject in equity to be converted into partnership effects and used for certain partnership purposes. In any suit, therefore, touching the interest of a deceased partner in the lands of the partnership, his heirs are necessary parties.—*Abernathy v. Moses*, 73 Ala. 381. And it may be stated as a general rule, that in a bill for final settlement of the estate of a deceased intestate, all the next of kin are necessary parties, so that, as Story expresses it, “the rights and claims of all may be conveniently established at the same time, and in the same suit.”—Story's Eq. Pl., §§ 89, 205, 201; *Teague v. Corbitt*, 57 Ala. 537. And when a suit in equity cannot be disposed of properly on its merits, for the want of necessary parties, objection may be taken on error, and, in the absence of objection, by the court, *ex mero motu*.—*Lawson v. Ala. Warehouse Co.*, 73 Ala. 294; *Boyle v. Williams*, 72 Ala. 353; *Prout v. Hoge*, 57 Ala. 29.

As the case must be reversed, because the infant children of the deceased intestate, who were his only next of kin and heirs at law, were not made parties, it may be well, for the

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purposes of another trial, to refer to some of the alleged errors in the final decree.

On the ground, that the interests of the complainant and infants in the litigation were supposed to be in substantial accord,—without reference to the fact, whether they were employed by the guardian *ad litem* of the infants, or represented them by other authority,—the chancellor allowed the solicitors of the complainant \$200 as a fee for their representation of said minors in this suit. He also allowed \$100 to the defendant's solicitor for his services as guardian of said minors, and to the guardian *ad litem* he allowed a fee of \$200. These allowances were not proper. The infants were not parties, to be represented by anybody. And if they had been, their interests were opposed throughout to those of the defendant, and, in one aspect of the case, to those of the complainant. The guardian *ad litem* of minor defendants in any cause, is their responsible representative; and no one can properly represent an infant, as guardian *ad litem* or as his attorney, who has an engagement to represent an adverse interest, however slight.

It is said the defendant was improperly charged with \$232 "on the Deshazo mortgage." On his statement of the receipts of the partnership, we find that he charges himself with this amount, as collected from W. L. Deshazo. Defendant sought to show that this was a mistake, and he ought not to have charged himself with that item. The only evidence we have on the subject is that of L. W. Kolb, taken before the register, and it is rather indefinite, too much so to be well understood. It was as follows: "W. L. Deshazo borrowed \$200, and interest, \$32, from Mrs. L. J. Parker (the complainant). Mr. H. Z. Parker bought the mortgage on the property, paying the difference between the mortgage and the value of the property, and gave Mrs. Parker credit for \$232, on her account at the store of H. Z. Parker, which included both her account as administrator and individual. If Mrs. Parker lent Deshazo her own money, and took mortgage to secure it, and the estate of S. D. Parker had no connection with the loan, and H. Z. Parker purchased the mortgage from her, and paid her, by giving her credit at his own store, and it was inadvertently charged, as an item of receipt by him of money for the partnership of H. Z. Parker & Son, the mistake ought to be corrected. It would be wrong in such case to charge him with it.

It appears from the evidence, that the defendant advanced to complainant, since his administration, for herself and children, for support and maintenance, the sum of \$954.33.

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The court required it to be ascertained how much of this sum was expended for the benefit of each distributee, and the amounts to be charged to them, respectively, in distribution. On a legal settlement, this would have been proper, if it was ascertained these sums were necessary to be advanced.

The evidence tends to show, though it is presented in an imperfect and very unsatisfactory form, that the store-house and lot in Ozark was purchased for, and conveyed by the seller to the firm of H. Z. Parker & Son; but it does appear that the purchase-money was all advanced by H. Z. Parker, and none of it by the deceased partner. Defendant charged the amount of the purchase-money, with interest, to the firm, as so much money paid by him on account of the purchase of the property, and to this credit he was entitled. For some unexplained reason, he procured a deed from the complainant, purporting, as the evidence tends to show, to convey the interest of her deceased husband in said lot to him. After the dissolution of the partnership, by the death of his co-partner, the defendant erected a brick building on said lot, the upper part of which is used as a hotel, and the lower, for two store-rooms, which he paid for out of his own means, and which cost him, as is agreed \$7,500; and this sum he seeks to have credited to himself, on the partnership settlement. The chancellor refused, on final decree, to pass upon the interest of the heirs in the property, holding that the question was not properly before the court; but did charge the defendant with the increased rents of the property, growing out of the improvements put on the lot by the defendant.

There is every reason to have this question settled in this suit. With all the parties in interest before the court, it is better to have it done, than to force them to resort to another bill for the purpose.—*McMaken v. McMaken*, 18 Ala. 578; Sto. Eq. Pl., § 72. It does not require partition to be made, as was supposed, before the interest of the survivor and of the heirs of the deceased partner in this property may be adjudicated. Without passing on the question now, we may refer to what the authorities seem to hold.

Mr. Freeman, in his work on cotenancy and partition says, "Neither cotenant has any power to compel the other to unite with him in erecting buildings, or making any other improvements upon the common property. If either chooses to make such improvements, he can not recover from the others their share of the expense incurred thereby, in the absence of an express agreement on their part, or such a

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course of dealing as to convince the court that a mutual understanding existed between them to that effect."—Freeman on Cotenancy & Partition, § 262; *Dech's Appeal*, 57 Pa. St., 472; *Ford v. Knapp*, 31 Hun, 522; *Bazemore v. Davis*, 55 Ga. 504; *Elrod v. Keller*, 89 Ind. 382; *Becnel v. Becnel*, 23 La. An. 502. And on this subject, see our own adjudications. *Ferris v. Montgomery Land Co.*, 94 Ala. 557, and authorities there cited. And as to whether or not the cotenant making such improvements may be charged with the increase of the productive value of the property resulting from his improvements, see Freeman on Cotenancy & Partition, § 262; *Nelson v. Clay*, 7 J. J. Marsh. 138; s. c., 23 Am. Dec. 387.

We have made the foregoing suggestions, on the record as it now appears. When new parties are made, new facts and questions may arise, variant from those now presented.

Reversed and remanded.

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Application for Mandamus to Circuit Clerk.

1. *Statutory lien of contractor or material-man; unused materials.*—The statutory lien given to contractors and material-men, for work done and materials furnished in the erection of a house or other improvements on land (Sess. Acts 1890-91, p. 578), does not extend to the unused materials left on the premises after the completion of the building or improvement.

APPEAL from the Circuit Court of Butler.
Tried before the Hon. JOHN R. TYSON.

J. C. RICHARDSON, for appellant.

C. E. HAMILTON, and L. M. LANE, *contra*.

STONE, C. J.—This was an application to the Circuit Court of Butler county, for a *mandamus*, or mandatory order, to the clerk of that court, commanding him to issue an *alias venditioni exponas* on a certain judgment therein described, of which the petitioner, R. A. Lee, represents himself as transferree and owner. The judgment was recovered by mechanics and material-men, for work and labor done and materials furnished in the erection of a hotel building on a

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certain described lot in the city of Greenville. The purpose and effect of the suit and judgment were the ascertainment and adjudication of the amount due plaintiffs, and the decision and declaration of a statutory lien in their favor for its enforcement, under the act approved February 12, 1891—Sess. Acts, 578. Judgment was by default, the suit not being defended.

The pleadings in that case are not before us, but the judgment itself, reciting the verdict of the jury on which it was rendered, is made part of the petition. The jury's finding was as follows: "We, the jury, assess the amount of plaintiffs' damages at \$8,025.00, and find that the Greenville Hotel and Improvement Company was and is, as alleged in said complaint, the owner of the land and hotel building described therein, and as such owner contracted with the plaintiffs for the erection of the said hotel building on the lot, as alleged therein; and that said plaintiffs, under such contract, have done work and labor, and furnished material for and used on said building and its erection, under said contract with the defendant; and that the amount thereof now due and unpaid and owing by the defendant to the plaintiffs is the sum of \$8,025.00; and further find that the plaintiffs filed their lien, and gave notice according to law, and as alleged in said complaint, and that the plaintiffs have a lien on said hotel building and the lands described in said complaint for the sum of \$8,025.00."

The judgment of the court pronounced on this verdict declared a lien on the hotel, and on the lot on which it was erected, for the payment of said judgment for \$8,025, and for the costs of the suit. We have no means of knowing, but suppose the verdict covers and includes all the property embraced in the complaint; particularly so, as the judgment was by default, and no defense being made.

In the petition before us it is conceded that the hotel and the lot it stands on have been sold, and the proceeds applied to the payment of the judgment; but it is claimed that a balance is left unpaid. The purpose of the present application is to obtain an *alias venditioni exponas* for the collection of that balance. The averment in the petition under which this relief is sought is in the following language: "The sheriff of Butler county, Alabama, sold said lot and the hotel building situated thereon, but did not sell the material therein or thereabout; that a large amount of material condemned by said judgment remains in and about said hotel building unsold, and that the said judgment remains in part unsatisfied, and in full force and effect." We have

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copied above the entire finding of the jury, as disclosed in the judgment; and the record furnishes no other information on the subject.

In the judgment pronounced on this verdict we find this language: "It is further considered, ordered and adjudged, that the said plaintiffs have a material-man's and mechanic's lien, as contractors of the defendant, upon said hotel and lot and material therein and thereunto belonging, for the said sum of \$8,025, and all cost in this behalf expended; and that the said hotel and material therein and thereabout, and the said lot of land hereinbefore described, be, and the same is hereby, condemned to the payment and satisfaction of said [lien?] and the amount hereinabove stated, to-wit, \$8,025.00, and all cost in this behalf expended."

The relief prayed in this case was, that the clerk of the Circuit Court be ordered and required "to issue a writ of *venditioni exponas*, commanding the sheriff of Butler county, Alabama, to sell the said material in and about the said hotel building, as ordered by the said judgment." The record contains no fuller or other description of "the material in and about the said hotel building," except that we have copied. The Circuit Court disallowed the motion, and denied relief; and from that order this appeal is prosecuted.

In addition to the lot of land on which the hotel was erected, and the hotel itself, which the judgment of the court ordered sold, the judgment declared a lien on, and condemned to sale "material therein and thereabout;" the connection in which these words were used showing that they referred to material in and about the hotel. It was to obtain a sale of this alleged material, that the *alias venditioni exponas* was moved for in this case. Of what that material consisted, its description, quantity, or value, neither the judgment-entry, nor the motion for *mandamus*, informs us. Neither is its ownership averred, nor is it anywhere stated that it is material which was used, or intended to be used, in the erection of the hotel. We hold that the Circuit Court rightly disallowed the mandatory order, for the following reasons: *First*, it is not shown in the judgment-entry, nor in the petition for the mandatory order, that the material referred to had any connection whatever with the erection of the hotel, or was intended to be used therein. *Second*, it is not shown that either in filing the claim in the office of the judge of probate, or in the suit or complaint in which judgment was recovered, declaring the lien, said material in or about the hotel was mentioned, or any claim to it as-

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serted, The verdict of the jury shows either that no such claim was set up, or, if set up, it was disallowed by them. *Third*, the act of February 12, 1891—Sess. Acts, 578—gives no lien on materials not used or employed in the building, &c.; and the lien, when given, attaches only to the building, article, or improvement into which it becomes incorporated, and not to the unincorporated, or unused material. *Fourth*, it is neither shown nor averred of what the alleged material consisted, nor is any description given, whereby the sheriff would be informed what he was commanded to seize. *Fifth*, it is not averred who was the owner of the said material. It may have been unused material, supplied by the contractors. If so, we can perceive no obstacle to their possessing themselves of it as their own. If it was the unused material of the Greenville Hotel & Improvement Company, petitioner fails to show he had any lien upon it; and it is not perceived there was any obstacle to its seizure under execution against the corporation or company.

We have not considered whether *mandamus* would be the appropriate remedy, if appellant had shown a right to relief. We decide nothing on that question. In any view of the case, appellant can take nothing by his appeal.

Affirmed.

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Motion by Sheriff for Instructions as to Application of Money on Executions.

1. *Lien of registered judgments.*—In determining the priority of the lien of judgments duly registered in the office of the probate judge (Sess. Acts 1888-9, p. 60), fractions of a day are to be computed, and the judgment first filed is entitled to priority over one filed on a subsequent hour of the same day.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. HENRY C. SPEAKE.

This was a motion by the sheriff of the county for instructions by the court as to the application of certain moneys in his hands arising from the sale of property under several executions against the F. H. Foster Manufacturing Company. These executions were issued on judgments ren-

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dered on the 4th September, 1890, in favor of W. P. Campbell & Co., Florence National Bank, German Security Bank, and other creditors; and the judgments in favor of the three creditors first named were duly filed for registration in the office of the probate judge on that day, in the following order of time: Campbell & Co., at 10:15 o'clock, A. M.; Florence National Bank, 3:30, P. M.; and German Security Bank, 9:45 P. M.; the others being filed on a subsequent day. The money in the hands of the sheriff was \$7,883.17, which was less than the amount due on the judgment in favor of Campbell & Co. The execution in favor of Campbell & Co. came to the hands of the sheriff on the 15th September, 1890, and the others on a subsequent day. The several judgment creditors appeared, and admitted the facts as stated. The court directed the money to be applied to the judgment in favor of Campbell & Co., to which ruling an exception was reserved by the German Security Bank and the Florence National Bank, and they here assign it as error.

EMMET O'NEAL, for appellants, cited Freeman on Judgments, 4th Ed., 669, § 370; 5 Amer. & Eng. Encyc. Law, 89; *Rockhill v. Hanna*, 4 McL. 555; *Mechanics' Bank v. Gorman*, 8 Watts & Ser. 304; *Burney v. Boyett*, 1 How. Miss. 39; 38 Mo. 100.

SIMPSON & JONES, *contra*, cited *Murfree's Heirs v. Carmack*, 26 Amer. Dec. 232, notes; *Biggam v. Merritt*, 12 Amer. Dec. 576; 2 Burr. 950; 7 Wait's Actions & Defenses, 231; *Bliss v. Watkins*, 16 Ala. 229.

McCLELLAN, J.—The sole question presented for review on this record is, whether fractions of a day are to be considered in determining the priorities of the liens of judgments registered in the office of the probate judge under the act of February 26, 1889.—Acts 1888-89, p. 60. While there is a general rule of law, having reference, it is believed, mainly to the computation of the time within which an act may or must be done, that fractions of a day will not be taken into account, yet, in cases like this, where the conflicting claims of parties are dependent upon the priority in point of time at which they severally accrued or attached in the form in which they are sought to be effectuated, the true doctrine, we apprehend, is, that the actual and exact time of accrual must be ascertained, and the respective rights of the claimants determined with reference thereto. This principle is recognized by Mr. Wait, who in effect says,

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that the fiction of law, that all acts done on the same day are to be held as done at the same time, does not obtain where rights depend upon the actual priority of acts done on the same day.—7 Wait's Actions & Defenses, 231. Lord Mansfield, in *Johnson v. Smith*, 2 Burr. 950, declared: "The court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong, contrary to the real truth and substance of the thing." And this court, while recognizing the general doctrine, as above stated, that the law takes no account of the fractions of a day, has declared, "that the same rule does not apply to statutes which, as between different acts, give a preference or priority to the one which is first done; and in such cases, courts will regard the fractions of a day."—*Lang v. Phillips*, 27 Ala. 311. And the same general principle is maintained in the following cases: *Murfree's Heirs v. Carmack & Williams*, 4 Yerger, 270; s. c., 26 Amer. Dec. 232, and notes; *Biggam v. Merritt*, Walker, 430; s. c., 12 Am. Dec. 576.

The application of this doctrine to the statute in question, and to the case at bar arising thereunder, must result in giving controlling importance to the precise moment of time at which judgments are registered so that priority of registration, to the extent of any fraction of a day, will carry with it priority and superiority of the lien which arises and attaches upon registration. This view finds support in all analogies of the law. It may be laid down as a very general proposition, that whenever it is provided that a lien shall attach upon the doing of an act by or in behalf of the party who asserts it, or seeks to fasten it upon property,—as, for instance, the filing for record of a mortgage, the placing of an execution in the hands of a sheriff, and the like,—fractions of a day will be considered in determining the priority, and consequent superiority, as between liens resulting from, or resting severally upon acts done on the same day.

Adopting this view, we hold, with the court below, that the lien of the appellee, whose judgment was registered at an earlier hour of the day on which appellant's judgment was registered, was a superior lien on the property of the defendant in judgment, and entitled to be first satisfied.

The judgment of the Circuit Court is accordingly *affirmed*; and this judgment will be entered and take effect as of the date of the submission of this cause.

Affirmed and rendered.

De Armond v. Whitaker.

Statutory Action in Nature of Ejectment.

1. *Homestead exemption to widow.*—The Probate Court has jurisdiction to allot to the widow, as a homestead exemption, the lands of which her husband died seized and possessed, when (and only when) they do not exceed 160 acres in area, nor \$2,000 in value, (Seas. Acts 1884-5, p. 114); and the title of the land so allotted vests absolutely in her, as fully and completely as if the husband's estate had been declared insolvent.

2. *Variance in description of land.*—Where the land sued for is described in the complaint, and also in the judgment-entry, by fractional subdivisions of a section aggregating 180 acres, the verdict being for the land sued for, while the plaintiff's documentary evidence conveys fractional subdivisions aggregating only 160 or 140 acres, the plaintiff is not entitled to the general charge on the evidence, and the judgment in his favor is erroneous.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

This action was brought by James Whitaker and others, the surviving brothers and sisters of Elijah Whitaker, deceased, and the children of his deceased brothers and sisters, suing as his heirs at law, against John DeArmond and David Davis; and sought to recover the possession of a tract of land, which was described in the complaint as "the north-east fourth of the south-west fourth, and the west half of the south-east fourth, and the south-east fourth of the south-east fourth, and the south half of the north-east fourth of the south-east fourth, all of section nine (9), in township six (6), of range three, east, lying and being in Marshall county." Issue was joined on the plea of not guilty, and the cause "was submitted to the court on the following statement of facts, the jury to be charged accordingly."

"It is agreed that that the parties to this suit claim title through or from a common source, Elijah Whitaker; and that said Whitaker died on the 23d day of January, 1884, seized and possessed of the land sued for, without having made any will, and without leaving any children, but [leaving] a widow, Nancy Whitaker. Plaintiffs in this case are the brothers and sisters of said Elijah Whitaker, and the children of his deceased brothers and sisters, embracing all of his brothers and sisters and the descendants of those who

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are deceased. At the time of the death of said Elijah Whitaker, he and his said wife were residents of said county of Marshall, and resided on the land in question. After the death of said Elijah, his widow, said Nancy, who was then a resident of said county of Marshall, filed in the Probate Court of that county her application for a homestead, and proceedings were thereon had setting apart to her the land in dispute as a homestead, without any administration on the estate of the said Elijah Whitaker; which said proceedings are hereby made a part of this agreement, and referred to as such. She was residing on the land in question at the time of such application and proceedings. This application and proceedings were under statute.—Acts 1884-5, p. 114. On the 11th May, 1887, said Nancy Whitaker sold and conveyed said lands in dispute, mentioned in the plaintiff's complaint, to the defendant Davis, by deed recorded in the office of the probate judge of Marshall county, in Book P of Deeds, page 270; which deed is hereby referred to, and made a part of this agreement. At the beginning of this suit [January 24th, 1890], defendant De Armond was in possession of said land as the tenant of said Davis. The annual value of the land in dispute, since the commencement of this suit, is \$30. Said Nancy Whitaker died in Marshall county, Alabama, in the year 1889, before the commencement of this suit. There has been no administration on the estate of said Elijah Whitaker, nor on the estate of said Nancy Whitaker."

The petition of Mrs. Whitaker, as shown by the exhibit, averred that she was the widow of said Elijah Whitaker, and was over 21 years of age, and resided in said county; that said Elijah died on the 23d *June* (?), 1884, more than 50 days before the filing of the petition; that he "left no minor children, and left in said county and State personal and real property not to exceed the amount exempted to widows and minors as provided under the laws of the State, and there has been no administration of said estate." The prayer of the petition was, that the court would appoint commissioners to set apart to her, "under the act of the legislature of 1884-5, p. 114, such personal and real property, as exempted to her as such widow under said act of the legislature." The court thereupon appointed Benton Robinson and David Davis as commissioners, to make a complete inventory of the personal property of the estate, and also of the real estate exempted from administration and the payment of debts, and to set apart to the widow "all of the personal property and real estate exempted to

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her as such widow under the provisions of the laws of this State;" and to make due return of their proceedings. The order to the commissioners was dated September 17th, 1886, and they made their return in writing, under oath, on the 9th October, 1886, stating that they had made an inventory of the personal property, setting it out, valuing it at \$179, and had allotted it to the widow; and adding: "Also, we have set apart to her, as exempted as a homestead, one hundred and sixty acres of land, \$500, bounded as follows: On the north by the lands of James Whitaker, on the east by Rollings Whitaker, on the south by the lands of Mrs. Clay, widow of James Clay, and on the west by the lands of J. H. Whitaker; and known by [the name of?] Great Swag, as 20 acres off S. end of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$; also, N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$; also, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$; also, N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, in section 9, T. 6, R. 3, East, in all 160 acres." The report was confirmed on the same day.

The deed of Mrs. Whitaker to David Davis, dated May 11th, 1887, describes the lands conveyed in the same words as contained in the report of the commissioners.

On these facts, the court gave the general affirmative charge in favor of the plaintiffs, and refused a like charge requested by the defendants; to which rulings the defendants duly excepted. The jury returned a verdict for the plaintiffs, "for the land sued for," with damages for its detention; and the court thereon rendered judgment for the plaintiffs, describing the lands as the "N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, all of section 9, T. 6, R. 3, East."

The charge given, the refusal of the charge asked and the judgment rendered, are assigned as error.

A. A. WILEY, and JNO. G. WINSTON, JR., for appellant.

LUSK & BELL, *contra*.

HARALSON, J.—The petition of the widow for exemption, made a part of the agreement of the parties on which the case was tried, avers that Elijah Whitaker left at his death real and personal property *not exceeding the amount exempted to widows and minors under the laws of this State*, following substantially the language of section one of the act of 1884–5, under which the petition purports to have been filed. The number of acres of land exempted to widows at that time, if it did not exceed \$2,000 in value, was 160

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acres; and the commissioners who set aside the exemption in this instance—which they report as 160 acres—valued it at \$500.

The number of acres described in the complaint as sued for is 180 acres. The verdict was “for the land sued for in this action.” The judgment was for the recovery of the identical land described in the complaint—180 acres. The report of the commissioners purports to set aside 160 acres to the widow, but when footed up it amounts to 140 acres.

The agreed state of facts recites, that said Nancy Whitaker “filed in the Probate Court of said county her application for a homestead, and proceedings were had thereon, setting apart *the lands in suit* to her as a homestead;” and yet we have just seen that the land sued for, and that described in the report of the commissioners, is different. The agreed state of facts further recites, as an admission for the trial, that “Nancy Whitaker sold and conveyed said lands in dispute, *mentioned in the plaintiff’s complaint*, to the defendant, David Davis.”

The lands described in the conveyance are, “20 acres off the south end of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, also N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, also S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, also N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, also S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, all in Sec. 9, T. 6, R. 3, containing 160 acres, (in) Marshall county, Alabama, which was set apart to me by the Probate Court of Marshall county, under the act of the legislature of 1884–5, as the widow of Elijah Whitaker, deceased.” The land described in the conveyance of Mrs. Whitaker to Davis, is different from that described in the complaint, judgment, and the report of the commissioners, but it is admitted, that they are the lands which are *mentioned in the plaintiff’s complaint*, and that defendant De Armond was in possession of them, as the tenant of said Davis, at the time this suit was brought.

These discrepancies of description have not been noticed in argument, on either side, but the case has been treated as though Elijah Whitaker owned at his death only 160 acres of land, which was set apart to his widow, under the proceedings for that purpose; the contention being, on the one side, that when so set apart, the absolute title vested in her, which she had a right to convey, and did convey to David Davis; and on the other, that such proceedings vested in her only a life-estate, and the remainder reverted to the heirs of Elijah Whitaker at her death. Whichever of these contentions may be correct, it is evident from what has been shown, that the plaintiffs have recovered of defendants 180 acres of land, twenty acres more than the agreed state of

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facts shows were really in controversy, and when we are left in ignorance as to what lands said Elijah Whitaker owned at his death, whether more or less than 160 acres. If he owned the 180 acres sued for, the Probate Court had no jurisdiction to set aside the homestead exemption under Mrs. Whitaker's petition, whether his estate was solvent or insolvent.—*James v. Clark*, 89 Ala. 606. If he owned only 160 acres, and it was of less value than \$2,000, and no administration was had on his estate after 60 days from his death had elapsed, that court did have jurisdiction to have her exemption set aside under said act, and it would have vested absolutely in her, as completely and fully as if said estate had been regularly administered upon and declared insolvent.—*Smith v. Boutwell* (at present term), 13 So. Rep. 568.

In the state of this record, with the discrepancies and seeming contradictions we encounter in the proofs, there was too much uncertainty to justify the general charge for the plaintiffs. On another trial, from what has been said, the real facts may be ascertained, and the cause tried on its merits.

Reversed and remanded.

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Action against Bail, on Forfeited Recognizance.

1. *What discharges bail; failure to find indictment.*—When a recognizance is conditioned for the appearance of the principal at the next term of the Circuit Court, "and from term to term thereafter until discharged by law" (Code, §§ 4420, 4431), and he fails to appear at the next term of the court, the bail are not discharged by the failure to find an indictment against him at that term when it appears that the case was regularly entered on the docket and continued, and that no order discharging them was asked or granted.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN B. TALLY.

This action was brought in the name of the State, suing for the use of Cherokee county, against J. D. Williamson, R. B. Kyle, and others; was commenced on the 26th July, 1890, and was founded on a recognizance executed by said Williamson as principal, and by the other defendants as his sureties, the condition of which is set out in the opinion.

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The record does not show how many of the defendants were served with process, or appeared and pleaded; nor does it show what pleas were filed, the judgment-entry only reciting that the cause was tried on issue joined. On the trial, the obligation sued on was read in evidence, and an agreement as to the facts as follows: "It is agreed that, some time in August, 1889, an affidavit was made before J. Gardner Stone, a justice of the peace for said county of Cherokee, charging John D. Williamson with the offense of unlawfully and with malice aforethought assaulting Patrick Calhoun with the intent to murder him; that said Williamson was then, and is now, a citizen of Georgia; that a requisition was made by the Governor of Alabama on the Governor of Georgia for the surrender of said Williamson, and he was surrendered; that said Williamson appeared before said J. G. Stone, justice of the peace as aforesaid, on September 30th, 1889, to answer said charge, waived all preliminary investigations, and appealed to a grand jury, by entering into said bond with sureties as set out in the complaint. It is agreed, also, that no indictment was or ever has been found against said Williamson for said offense, or any other, by a grand jury of said county; that said Williamson never appeared before said Circuit Court, at any term thereof, to answer said offense, but has made default therein; that said prosecution and case against said Williamson was entered on the trial docket of said Circuit Court, at the December term, 1889, and now stands on said docket, and has been regularly continued on said docket."

On these facts, the court charged the jury, on request, that they must find for the defendants, if they believed the evidence. The plaintiff excepted to this charge, and it is here assigned as error.

WM. L. MARTIN, Attorney-General, for appellant.—The defendants' obligation was not discharged, nor was the prosecution discontinued, by the failure of the grand jury to find an indictment at the first ensuing term of the court.—1 Bish. Crim. Pro., § 264; *People v. O'Brien*, 41 Ill. 303; *Garrison v. People*, 21 Ill. 535; *Wheeler v. People*, 39 Ill. 430, *State v. Cocke*, 37 Texas, 155; *State v. Storet*, 6 Halst. N. J. 124; *People v. Stager*, 10 Wend. 431; 143 Mass. 210.

COLEMAN, J.—This action was instituted in the name of the State of Alabama for the use of Cherokee county, and was commenced by regular summons and complaint. The suit was founded upon a bail-bond executed by the defend-

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ant J. D. Williamson, and sureties, payable to the State of Alabama, "unless the said J. D. Williamson appear at the next term of the Circuit Court of Cherokee county, and from term to term thereafter until discharged by law, to answer a criminal prosecution for the offense of unlawfully and with malice aforethought assaulting Patrick Calhoun with the intent to murder him." The bond was approved by the magistrate who required the undertaking. We are unable to detect any defect in the bond, tending to affect its validity. It is in accordance with the form of bail-bonds as prescribed in section 4420 of the Code. The case was tried and submitted to the jury upon an agreed state of facts, which appears in the statement of the facts of the case. The condition of the bond is, that the defendant Williamson will appear from term to term until discharged by law.

By section 4431 of the Code, it is declared, "The essence of all undertakings of bail . . . is the appearance of the defendant at court; and the undertaking is forfeited by the failure of the defendant to appear," &c. By the agreed statement of facts, the obligor did not appear at the next term of the court, and from term to term until discharged by law. By the failure to appear according to the undertaking, it was forfeited. The State had the right to pursue the statutory remedy, or bring suit upon the bond, averring the breach of its condition. The latter remedy was adopted. No pleas are set out. The judgment-entry states that, "issue being joined, came a jury," &c. We presume only the plea of the general issue was interposed. There are certainly no facts stated in the agreement which present a defense to the complaint. That the grand jury did not prefer an indictment, is no answer to the complaint. Possibly, the State was unable to procure the attendance of the witnesses at the next term of the court. Certainly the State has not abandoned the prosecution. The facts show that the case was regularly docketed and continued. There has been no order discharging the obligors from their undertaking. The sureties had the right to surrender their principal to the custody of the proper officer, and thereby secure their discharge. They might have appeared at court, and upon motion, sustained by proper showing, have obtained an order discharging their principal. They might have shown, if the facts warranted it, providential cause, or unavoidable hindrances, which prevented the performance of the conditions of the bond. The one fact that the grand jury did not indict, does not answer the complaint. This conclusion is sustained by the decisions of this court, as

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well as those of many other States.—2 Amer. & Eng. Encyc. of Law, p. 32; *Wheeler v. The People*, 39 Ill. 430; *Garrison v. The People*, 21 Ill. 535; *State v. Cocke*, 37 Tex. 155; *People v. Stager*, 10 Wend. (N. Y.) 431; *Commonwealth v. Teevens*, 143 Mass. 210; *State v. Stout*, 6 Halstead (N. J.) 124.

It may be that, if there had been no order made in reference to the bond, such as calling the principal obligor, and declaring a forfeiture upon his failure to appear, or docketing the case against them and continuing it for future action, such omission might have worked a discontinuance of the case, which would have authorized the discharge of the obligors. But the action of the court, as shown by the agreed facts, clearly shows that the State had not discontinued the prosecution, and made no order discharging the bail.—*Goodwin v. Governor*, 1 S. & P. 465; *Rogers v. The State*, 79 Ala. 59.

The court erred in charging the jury to find for the defendants.

Reversed and remanded.

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Bill in Equity to enforce Statutory Lien of Contractor and Material-man.

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1. *Statutory lien of mechanics and material-men; what laws are of force.*—The statute approved February 12th, 1891, entitled "An act to provide liens for mechanics and material-men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041, of the Code, and section 3027 as amended by the acts of 1888-89," (Sess. Acts 1890-91, pp. 578-80), though capable of execution as a complete system in itself, is to be construed in connection with the unrepealed sections of the former law, making the law now of force to consist of the express provisions of the new statute and the unrepealed sections of the old law as amended or changed by the new.

2. *Jurisdiction of equity to enforce statutory lien.*—Since the passage of the act approved Feb. 12th, 1891, as before (Code, § 3048), the statutory lien of a mechanic or material-man may be enforced by bill in equity, when the amount claimed is \$100 or more, without alleging or proving any special ground of equitable jurisdiction.

APPEAL from the City Court of Birmingham, in equity.

Heard before the Hon. H. A. SHARPE.

The bill in this case was filed on the 27th August, 1892,

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by Willis D. Colby, against the St. James (Colored) M. E. Church, a private corporation, and H. Adkins & Sons, as defendants; and sought to enforce a statutory lien on a lot and building owned by the church, for work done and materials furnished by plaintiff on the church building, under contract with the agents or trustees of the church, amounting to \$111.25, with interest from January 1st, 1892. The work was done and the materials were furnished in November and December, 1891; and it was alleged that the claim was regularly filed within ninety days after the completion of the work, in the office of the probate judge of Jefferson, and that ten days notice, prior to the filing, was given to the trustees or agents of the church. Adkins & Sons were joined as defendants on the allegation that they claimed an interest in the property under a mortgage, which was subsequent and inferior to the complainant's lien. The court sustained a demurror to the bill, on the ground that a court of equity had no jurisdiction to enforce the statutory lien; and this decree is here assigned as error.

HILL & HILL, and L. C. DICKEY, for appellant.—Prior to the passage of the statute approved February 12th, 1891, there could be no doubt of the equity of the bill in this case—Code, § 3048; *Wimberly v. Mayberry*, 94 Ala. 251. That statute expressly repeals several sections of the Code by number, and all other statutes inconsistent with its provisions; but the section giving the remedy in equity, (§ 3048) is not expressly repealed, nor is it repealed by implication, since it is not repugnant to any provision of the repealing law. The repeal of a statute by implication is never favored, and statutes *in pari materia* are so construed, if possible, as to give due effect to each.—Endlich on Statutes, 263, 271; Cooley's Const. Lim., 11, 12; *Huffman v. State*, 29 Ala. 40; 89 Ala. 103; 47 Maine, 28; 1 Kent's Com. 463; 9 East, 486; 46 Ala. 299, 397.

LANE & WHITE, *contra*.

HEAD, J.—Chapter 3, Title 2, Part 3 of the Code of 1886, comprised the general statutes of this State when that Code was made and adopted, which defined, declared and provided for the enforcement of liens of mechanics and material-men. The chapter embraced thirty-one sections, numbered 3018 to 3048, inclusive. The first of these sections declared the lien, and the remaining ones made many provisions, such as regulating the priorities of liens, the rights of lessor and

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lessee, the procedure necessary to effectuate the lien, and for its enforcement in the courts. Section 3028 was as follows: "When the amount involved exceeds fifty dollars, actions for enforcement of liens under this chapter shall be brought in the Circuit Court, or court having like jurisdiction, of the county in which the property is situated; in all other cases, such actions shall be brought before justices of the peace." The next section (3029) prescribed the pleading and practice in such actions. Section 3048 was as follows: "Any lien provided for under the provisions of this chapter, when the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity, without alleging or proving any special ground of equitable jurisdiction."

In practice, under this system of laws, the courts of law and equity were invoked for the enforcement of these liens, either tribunal being selected as the pleasure of the party suing might dictate; and it has never been objected, that we are aware of, and indeed could not be plausibly argued, that there was such incongruity or inconsistency in the two sections as they stood in the Code, as that both could not stand and be well administered. The two, being *in pari materia*, were treated as giving the remedy by bill in equity, in addition to the jurisdiction of the courts of law conferred by the first, although that section is complete in itself, and, without more, would be held to confer the jurisdiction exclusively upon courts of law, in the absence of special grounds of equitable interposition.—*Walker v. Daimwood*, 80 Ala. 246; *Chandler v. Hanna*, 73 Ala. 392.

With this chapter of laws in force, on February 12, 1891, the General Assembly passed "An act to provide liens for mechanics and material-men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041 of the Code, and section 3027 as amended by the acts of 1888-89." The first section of this act declares an express repeal of the Code sections just enumerated; and the remaining sections of the act then proceed to make provisions supplying, in modified form, the deficiencies in the system created by this repeal, and making some new provisions touching subjects not before provided for; and the last section of the act declares the repeal of all laws in conflict with the act. It will thus be observed that, by this act, seven particular sections of the Code chapter were expressly repealed, and twenty-four retained, unless they or some of them were also repealed by reason of inconsistency, as declared by the last section of the act. Now, we find by comparison that the several sections of the new

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act, interlaced and supplemented by those Code sections which were not repealed by name, form a congruous and harmonious system for the establishment and enforcement of liens of mechanics and material-men; and whilst the act itself may be capable of enforcement, as a system complete in itself, without the Code sections retained, yet the retained sections are well adjusted to the provisions of the act, and supply many provisions useful to the ease and efficiency of the system created by it. We therefore feel no hesitation in holding, that the legislative intention was that the laws of this State, in reference to these liens, should consist of the several sections of the act of February, 1891, interlaced and supplemented, as we have said, by those sections of the Code which were not repealed; the whole forming a complete system for the regulation and enforcement of all rights arising under it.

Now, it will be noticed that section 3028 of the Code above copied, which conferred the jurisdiction on courts of law, was one of the expressly repealed sections; but, in lieu thereof, section 8 of the act was adopted, which provides, "that when the amount involved exceeds one hundred dollars, action for enforcement of lien under this chapter shall be brought in the Circuit Court, or court having like jurisdiction, of the county in which the property is situated; in all other cases, such action shall be brought before justices of the peace, whose judgments shall be executed as now provided by section 3037 of the Code." This repeal of 3028, and the adoption of this section 8 of the act, manifestly had no other purpose than to change the jurisdiction of the Circuit Court as to sum, from a minimum of fifty to one hundred dollars; to increase that of justices to one hundred dollars, and supply the omission effected by the repeal of section 3037, as to how justices should enforce their judgments. The effect is precisely the same as if the section (3028) had not been repealed and the new section adopted in its place, but had been amended by changing fifty to one hundred dollars, and providing the manner of enforcing justice's judgments. Thus, when we view the entire law as it was thus formed by the act of 1891, we find it, in its structure, in effect the same as the chapter of the Code in force at the adoption of the act. Provisions of the old system are modified, and new ones added, but the structure of the law is the same, and in it we find the two sections, the one conferring jurisdiction on courts of law, and the other on courts of equity, standing together just as they did before.

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We are of the opinion that the jurisdiction of equity, in such cases, was not repealed or impaired, and that the City Court erred in so holding.

Reversed and remanded.

Winter v. London.

Action on Appeal and Supersedeas Bond.

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123	339
99	263
127	416
99	263
e144	396

1. *Grant of administration on estate of non-resident decedent.*—On the death in New York of a resident citizen of that State, intestate, and owning a certificate for shares of stock in an Alabama corporation, the Probate Court of the county in which such corporation is located has jurisdiction to grant letters of administration on his estate (Code, § 2013, subd. 3); although an administrator appointed in New York would have authority to transfer the certificate (§ 1872), and payment of dividends might lawfully be made to him.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Alex. T. London, suing as the administrator of the estate of Daniel S. Schanck, deceased, against Mrs. Mary E. Winter, Joseph S. Winter, and others; and was founded on an appeal and *supersedeas* bond, which the defendants had executed on taking an appeal to the Supreme Court from a decree rendered by the City Court of Montgomery, sitting in equity, in a suit instituted by the Montgomery Gas-Light Company, by bill of interpleader, against said London as administrator, Mrs. Winter, Joseph S. Winter, and John G. Winter. The object of that suit was to determine the ownership of certain certificates for shares of stock in said corporation, which were in London's possession as administrator, and which he sought to have transferred to him on the books of the corporation, and which were also claimed by Mrs. Winter, who denied the validity of the transfers under which London's intestate acquired and held them. The City Court sustained London's claim, and rendered a decree in his favor; and the appeal was taken from that decree. The Supreme Court affirmed the decree, as shown by the report of the case—89 Ala. 544. The condition of the appeal bond was, that "if the said Mary E. Winter and Joseph S. Winter fail in said appeal, and pay such judgment as the Supreme Court may render in the

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premises, and all such costs and damages as any party aggrieved may sustain by reason of the wrongful appeal and the suspension of the execution of the decree appealed from, then this obligation to be void," &c. The complaint assigned as a breach of the bond, that the obligors had failed to pay the costs and damages incurred by the plaintiff in the defense of said appeal, and claimed as damages \$200 for attorney's fees incurred and paid in that behalf. The defendants filed several special pleas of *ne unques administrator*, assailing the validity of the plaintiff's letters of administration, and issue was joined on these pleas.

It was admitted on the trial, as the bill of exceptions shows, that said D. S. Schanck, plaintiff's intestate, died in 1872, in New York, of which State he was then a resident citizen; that letters of administration on his estate were granted to plaintiff, by the Probate Court of Montgomery county, Alabama, in 1887; "that the only property owned by said decedent or his estate, at the time of the grant of said letters, which was claimed to be assets of the estate in Alabama, was three certificates together calling for five shares of the capital stock of the Montgomery Gas-Light Company, with the accrued dividends thereon, amounting to \$500, which certificates were in the possession of said London at the time of his appointment as administrator, but had not been transferred on the books of said company; that said company is a corporation chartered under the laws of Alabama, and has its office and place of business in the city of Montgomery; that these facts appear and are correctly stated in plaintiff's application for the grant of letters, and letters were granted to him on said application and facts; that said letters are on their face correct and regular; that said London qualified as such administrator, and has ever since acted as such." The facts above stated, as to the interpleader suit, the appeal, bond, &c., were also admitted; and further, that plaintiff's damages, if he was entitled to any, should be assessed at \$150.

On these facts, the court charged the jury, on request, that they must find for the plaintiff if they believed the evidence; to which charge the defendants excepted, and they here assign it as error.

GORDON MACDONALD, for appellant.

TOMPKINS & TROY, *contra*. (No briefs on file.)

[Winter v. London.]

HARALSON, J.—Section 2013 of the Code provides, that “Courts of probate, within their respective counties, have authority to grant letters of administration on the estates of persons dying intestate,” in five specified instances, the 3d of which is, “Where the intestate not being an inhabitant of the State, dies out of the county, leaving assets therein.”

The conditions on which the letters of administration were granted to plaintiff, were exactly in accordance with this section of the Code; and there is no proof in the record that the plaintiff's intestate owned any property, at the time of his death, outside of Montgomery county in this State, or that any administration was ever had elsewhere on his estate.

By the agreed state of facts on which the case was tried, it is shown that plaintiff's intestate died a resident citizen of the State of New York, in the year 1872, and at the time of the grant of letters of administration to plaintiff, by the Probate Court of Montgomery county, in 1887, and at the time of the death of plaintiff's intestate, the property owned by deceased, and claimed to be assets of his estate, as three shares of the capital stock of the Montgomery Gas-Light Company,—a private corporation having its place of business in the city and county of Montgomery, Alabama,—amounting, with the accrued dividends thereon, to \$500, the certificates for which plaintiff held at the time he was appointed administrator; that the foregoing facts appear and are correctly stated in plaintiff's application to said Probate Court for letters of administration; that the letters, on their face, are correct and regular, and that plaintiff qualified, as such administrator, and has ever since been acting as such.

The defendants below contended,—and that is the question they present for our decision,—that the grant of letters of administration to plaintiff by said Probate Court was void, on the ground, that his intestate died in the State of New York, of which he was a resident citizen, at the time of his death, and no facts existed authorizing any court in Alabama to grant letters of administration on his estate, and that on this ground, alone, plaintiff is not entitled to recover. This contention is based on section 1672 of the Code, which authorizes a foreign executor and administrator to transfer the shares of stock held and owned by the testator or intestate, in any private corporation existing under the laws of this State, and payment of dividends on such stock to be

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made to such executor or administrator. But the same section confers the same power and authority on an executor or administrator, deriving his appointment from a court of probate in this State. If there is any conflict between these two sections of the Code, above referred to, it is our duty to construe them *in pari materia*, and make them both operative, if such a construction can be placed upon them. There is, however, no conflict between them. The latter section merely provides for the transfer of stock by a foreign executor or administrator, when there is no administration in this State. It does not deny the same right to an administrator appointed here. It is simply cumulative, in extending this authority to a foreign executor or administrator, made so to subserve an obviously good purpose.

It is scarcely necessary to add,—a principle so often repeated,—that the Probate Court has general jurisdiction over the subject of the administration of estates, and having the right to determine its jurisdiction, on the facts presented in any given case invoking its authority to issue letters of administration, when it does so determine, and proceeds to issue the letters, the order granting them will survive any mere collateral attack.—*Sullivan v. Rabb*, 86 Ala. 433; *Nicrossi v. Giuly*, 85 Ala. 365; *Bardlett v. Treece*, 77 Ala. 528; *Goodman v. Winter*, 64 Ala. 431; *Broughton v. Bradley*, 3 Ala. 694.

The facts set out in the application of the plaintiff to the Probate Court of Montgomery, to be appointed administrator of said estate, gave the court jurisdiction to issue letters of administration to him. As such administrator, he has the right to maintain this suit against defendants, and, under the undisputed evidence in the cause, to recover the judgment which was rendered in the court below, in his favor.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

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114	414
90	296
129	617

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Contested Claim of Exemption of Personal Property.

1. *Sufficiency of inventory.*—When a debtor claims as exempt stock of goods which is in the possession of the sheriff under the levy of an attachment, it is sufficient to describe the goods in his inventory as they are described in the levy and inventory of the sheriff.

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2. *Fraudulent conduct of debtor, as affecting claim of exemption.*—When the inventory filed by a debtor, claiming an exemption of personal property, is contested by attaching creditors, his fraudulent conduct in collusion with another person, who first sued out an attachment, is not relevant to the issue involved, except so far as it shows that he had other moneys or effects not included in his inventory.

3. *Contest of inventory; what should be included in it.*—When a debtor's inventory of property claimed as exempt, which is contested by attaching creditors, includes only a stock of goods valued at less than \$1 000, and the evidence shows that their value exceeds that sum, the excess should be deducted from his claim; and if it is shown that he either received or paid out moneys, at any time between the interposition of his claim of exemption and the filing of his inventory, that amount also should be deducted; but, if it is shown that he has transferred to a creditor outstanding notes and accounts, nominally in excess of his debt, with a stipulation that any excess, if collected, shall be paid to him, he can not be charged with any excess, in the absence of evidence showing what amount has been or may be collected; yet he should state the facts in his inventory.

APPEAL from the City Court of Decatur.

Tried before the Hon. WM. H. SIMPSON.

The appellees in this case, several mercantile partnerships, sued out attachments against Isaac Pinkus, a merchant doing business at Decatur under the name of I. Pinkus & Co.; and their attachments were levied on the same stock of goods. These several attachments were levied on the 5th–7th March, 1890, and Pinkus filed with the sheriff, on the day last named, a claim of exemption to the goods. On the 3d March, prior to these several levies, an attachment had been sued out against said Pinkus by one Herbert Cartwright, and his attachment was, on that day, levied on the same stock of goods. After the levy of the subsequent attachments, the plaintiffs therein each filed a bill on the equity side of the court, against Pinkus and Cartwright, attacking the proceedings under Cartwright's attachment, on the ground of fraud and collusion between him and Pinkus, and seeking to subject the attached goods to the satisfaction of the plaintiffs' several debts. In these several suits, Pinkus again filed his claim of exemption. On the 18th April, 1890, the plaintiffs demanded an inventory of his property from Pinkus; and on the 21st April, in response to this demand, he filed an inventory, in the nature of an amendment of his claim of exemption, claiming the same stock of goods, describing them as in the sheriff's inventory and levy, and alleging that he could not give a more definite description of them because they were in the possession of the sheriff. The plaintiffs excepted to the sufficiency of this inventory, but the court held it sufficient; and they then filed a contest

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of the claim of exemption, on the ground that it was "invalid entirely." The issue formed on the contest being submitted to the decision of the court, on the evidence taken by depositions, the court held that the "subsequent filing of the petition on the equity side of the court, and the answer thereto, present the issue provided by section 2531—that the defendant has other personal property, subject to levy and sale under the attachments, not embraced in the inventory." On this issue, the court found that Pinkus was chargeable with \$372.35, moneys traced to his possession after filing his claim of exemption, and \$485, the value of his notes and accounts transferred to one Friedman, in excess of the debt due to him; and deducting the aggregate of these sums (\$857.35), allowed an exemption of only \$142.55, out of the proceeds of sale of the attached goods in the hands of the sheriff.

The defendant appeals from this decree, and here assigns it as error, with several rulings excluding portions of the deposition of one Goldsmith.

R. A. McCLELLAN, and KYLE & SKEGGS, for appellant.

HUMES, SHEFFEY & SPEAKE, and W. R. FRANCIS, *contra*.

STONE, C. J.—The present suit grew out of the claim by Pinkus of statutory exemption of personal property of the value of one thousand dollars.—Code of 1886, § 2511.

The personal property of defendant, consisting of merchandise, was attached by his creditors, commencing on March 3, 1890, and continuing for two or more days. The attachment of Bamberger, Bloom & Co. was levied on March 5. This was the first levy made on the lot of merchandise which was found in an upper room, over Friedman's business house. On March 7—two days after this levy—Pinkus asserted his claim of exemptions in the attachment suits. The merchandise found over Friedman's store, and attached, was selected by him, and made the subject of his claim of exemptions. For reasons to be presently stated, neither the claim of exemptions asserted in the attachment suit, nor the attachment suit itself, has ever been brought to trial. As we have said, the first attachment—that of Cartwright—was not levied on the goods found over Friedman's business house.

Soon after the levy of the attachments, the attaching creditors, except Cartwright, who was first in point of time, filed bills against Pinkus and Cartwright, charging collusion

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and fraud in the asserted claim, and in the attachment sued out by the latter, and praying to have said first attachment, and the claim it sought to enforce, displaced, and to have the claims of complainants paid, in preference to the alleged claim of Cartwright. Against these suits, which for the present service were consolidated, Pinkus, in April, 1890, renewed and re-filed his claim of exemption. We say renewed, for it specifies the same property to which claim had been interposed in the attachment suits on March 7. This was but a continuation of the original claim first filed, for the several bills filed, against which the claim was set up, were, for all practical purposes, only a continuation of the suit and contention inaugurated by the attachments.

This claim of exemptions being refiled in the chancery causes, the complainants gave written notice, demanding a verified inventory under section 2525 of the Code of 1886. An inventory was filed, the sufficiency of which was excepted to by complainants. The court overruled this exception, and thereupon the complainants filed a sworn contest of the exemption, under section 2520 of the Code. The contest asserted that, in the belief of affiant, the claim was "invalid entirely."

We hold that the chancellor did not err in holding the inventory rendered in this case sufficient. The effects of the petitioner had been attached, and were in the hands of the sheriff. In such conditions, it can not be presumed, or assumed, that he could give a fuller or more particular description than he did give. It results that the question—the only question—left for determination in the lower court, was whether petitioner was entitled to exemption of personal property, and the extent of his rightful claim. He made oath that he had no money, and that the property set forth in his inventory embraced his entire personal effects, "except his wearing apparel."

There is testimony in this record bearing on the relations and transactions between Pinkus and Cartwright, the first attaching creditor; and it is contended that these transactions are not consistent with fair dealing. We hold, however, that on the issue presented by this record such inquiry was wholly immaterial, except to the extent, if any, it showed that Pinkus had moneys or other effects which he failed to discover in his inventory. No matter how fraudulent his conduct and intention may have been, if he was a resident of Alabama, he was entitled to have set apart to him, as exempt from his debts, one thousand dollars in value of his personal property, to be selected by him.—Code of 1886,

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§§ 2515, 2521. But his rightful claim on this account did not, and could not, extend beyond the one thousand dollars in value. There was testimony tending to show that the goods claimed exceeded \$1,000 in value. If such was found to be the case, then the claim should have been disallowed for all in excess of the \$1,000.

The real contest in this case is over certain deductions which the primary court made from the thousand dollars claimed by the petitioner. And, first, on account of certain moneys alleged to have been traced to his possession between the time when he first made his claim, and the filing of his inventory. It was shown in the testimony of Pinkus himself that, between the first filing of his claim of exemption and the filing of his inventory, he received from the insurance companies, as return premiums on the cancelled policies he had held on his stock of merchandise, the sum of \$133.48. During the same time, he testified, he paid out \$238.48—\$190 to one person, and \$48.48 to another. The payment of these sums shows that during that time he had in his possession at least as much money as the sums he paid out. These belonged to his inventory, and he must not be permitted to wrong his creditors by such payment. He must account for the money he thus held, or received as so much of his exemption.

It is claimed, and the primary court so held, that other moneys were traced to the possession of Pinkus. There is no testimony which shows that he did not utilize the moneys he received in the return premiums, in making the payments he admits he made, nor is any other money traced to his possession during that time. We can not, in the entire absence of testimony on the question, presume that he did not use the return premium money in these payments. We place the reduction of his exemption claim on account of moneys traced to his possession at \$238.48.

Another reduction claimed and allowed arose as follows: Pinkus owed Friedman sixteen hundred and fifteen dollars. Just preceding the issue and levy of Cartwright's attachment he paid this debt in the following manner: He traded a note sold to him, Friedman, his notes and book accounts, amounting to about twenty-one hundred dollars. This was an absolute sale, and an absolute payment; but it was agreed that if Friedman realized more from the claims than the amount due him, he was to pay the surplus to Pinkus. There was no testimony as to the amount collected on the notes and accounts, or to what extent they were collectible. The court deducted the sum of the excess of these claims over the

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amount due Friedman, from the exemption he allowed to Pinkus. In this the court erred. There was no reliable testimony that any sum ever would accrue to petitioner from that source; and if anything should accrue, no data were furnished for ascertaining its amount or value.

Notwithstanding we decline, for the reasons stated, to charge Pinkus with this balance, as a discount *pro tanto* from the amount of his exempt personalty, still we hold that it should have been noticed and embraced in his inventory. It was money to become due to him, in the event an excess should be realized; and whatever the sum might prove to be, his attaching creditors were entitled to it, to be reached, *perchance*, by garnishment.

It results from what we have said that Pinkus, under his claim, was entitled to personal property of the value of one thousand dollars, less two hundred and thirty-eight 48-100 dollars. This leaves for him, and subject to his rightful claim, seven hundred and sixty-one 52-100 dollars; \$761.52.

Reversed and remanded, to be disposed of on the principles we have declared.

Reversed and remanded.

Morrow v. Russell.

Walling v. Russell.

Campbell v. Russell.

Applications for Mandamus in matter of Contested Elections.

1. *Contest of election before probate judge; security for costs.*—The contest of an election to a county office before the probate judge (Code. §§ 416-27), though triable by the judge and not by the court, is properly regarded as a case pending in the court, and bond or security for costs, or any other paper filed in the case, is properly entitled in its caption as of a case pending in the Probate Court.

APPEALS from the City Court of Decatur.

Heard before the Hon. WM. H. SIMPSON.

Applications by D. B. Morrow, W. J. Walling, and A. B. Campbell, respectively, for writs of *mandamus* to be directed to Hon. E. M. RUSSELL, probate judge of Morgan county, requiring him to dismiss contests of election pending before

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him, one against each of the petitioners, on the ground that the contestants had not given security for the costs as by law required. Judge SIMPSON refused to grant the writ in each case, and these appeals are taken from his orders refusing it.

E. W. GODBEY, WERT & SPEAKE, for appellants, made these points: (1.) Every pleading, or other paper filed in a cause, must be so marked as to identify the cause, and the court in which it is pending; and this is properly done in the heading, or caption of it.—2 Chitty's Pl., 1, 16th American Edition; Boone on Code Pleading, § 8, citing *King v. Bell*, 13 Neb. 409; *McCloskey v. Strickland*, 7 Iowa, 258; *Drury v. Mann*, 4 Wis. 202; *Bull v. Kramer*, 14 Kan. 101; *Patterson v. State*, 10 Ind. 296. (2.) In each of these cases, the contest was triable, not before the Probate Court, but before the judge of that court as a special tribunal. The Probate Court, under constitutional provisions, is invested with "general jurisdiction for the granting of letters testamentary and of administration, and of orphans' business;" and jurisdiction in other special cases has been conferred on it by statute. But the trial of a contested election is foreign to its constitutional jurisdiction, and is not within any of its special statutory powers. In fact, it is not a judicial function, but a special proceeding authorized and regulated by statute; and it is doubtful whether it is not wholly a matter of administration, within the executive department of the government, and can not with propriety be referred to the judiciary. 6 Amer. & Eng. Encyc. Law, 413; *State v. Dortch*, 6 So. Rep. 777, following 13 La. Ann. 89; McCreary on Elections, §§ 392, 407, 421. The several provisions of the statute regulating these and other contests of election clearly recognize and preserve the distinction between the judge, on whom the jurisdiction is conferred, and the court of which he is the presiding officer. (3.) The security for costs is, on its face, an obligation to answer for the debt, default, or miscarriage of another.—Code, § 1732, par. 3; *Bullard v. Johns*, 50 Ala. 382. As such, it is fatally defective under the statute, and its defects can not be aided by parol evidence. *Smith v. Jones*, 42 Amer. Rep. 72; 71 Ala. 452, 43 Maine, 158.

J. B. MOORE, and ROULHAC & NATHAN, *contra*.

McCLELLAN, J.—These are appeals from orders of the City Court of Decatur denying applications for writs of *mandamus* to be directed to the probate judge of Morgan county, VOL. xcix.

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requiring him to dismiss contests of elections to the office of sheriff, tax-collector and clerk of the Circuit Court of Morgan county, pending before him. The sole alleged ground for dismissing said contestations is, that the several contestants had not given security for the costs thereof, as required by the statute; and the contention that they had not complied with the law in this regard is rested solely on the fact that the bonds which were given, and which were intended to be security for costs, and which in every other respect were entirely formal, regular and sufficient, each had the following caption: "State of Alabama, Morgan County: In the Probate Court of Morgan County, Alabama." The argument is, that the caption is an essential part of the bond; that it is of vital importance that it should correctly state the forum in which the paper is filed, failing in which the bond is void; that these contests were pending *before the judge* of the Probate Court, and not *in the Probate Court*; that these captions show that the bonds were filed in a tribunal in which the cases, to secure the costs in which they were intended, were not pending, and hence no bonds at all can be said to have been filed in the tribunal where the cases are pending, and that therefore the proceedings must be dismissed. The invalidity of the bonds is also sought to be supported by an ingenious argument based on the provision of the statute of frauds which requires undertakings to answer the debt, miscarriage or default of another to be in writing expressing a consideration; the assumption that bonds securing costs are such undertakings as to the sureties, and the supposed inaccurate statement of the forum in the caption. But this argument, as well as all other suggestions of counsel for appellants, proceeds entirely on the theory that the caption, in point of fact, is an incorrect statement of the tribunal.

Without following the argument of counsel, or committing ourselves to the soundness of any one of the several propositions advanced, we experience no difficulty in sustaining the action of the City Court, upon the broad ground that the caption of the bond in each of these cases correctly sets forth the tribunal in which the law requires security for costs to be given. We need not hesitate to concede that these causes are triable by the *judge* of probate, and not, strictly speaking, by the Probate Court. It does not follow from this concession that the bonds must appear to have been filed before or with said *judge* as an individual separate and apart from the court, any more than that bonds for security for costs in contests of elections to the General

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Assembly should be filed in the House or Senate as the case may be, because the trial is to be had before one or the other of those tribunals, or that security for the costs of contest triable by a circuit judge or chancellor should be filed with and be entitled as before those officers, instead of being lodged with the clerk of the Circuit Court or the register of the Chancery Court, and made to bear a caption appropriate to papers filed in said courts: it does not follow, in other words, from the fact that a cause is by statute made triable by and before the presiding officer, or the individuals constituting the membership of a tribunal, that the cause is pending before such officer or individual and not the court of which they are officers, or even in an entirely different court, for any purpose whatever. For instance, in contests of the election of members of the General Assembly, the cause is in a sense pending in the Circuit Court of the county, or a Circuit Court of the senatorial district, for security for costs must be there filed and approved by the Circuit Court clerk, (Code, § 408); notice of contest must be returned to him after service, (Code, § 411); interrogatories to take testimony must be filed with him, and he must issue commissions to that end, (Code, § 412; *Roney v. Simmons*, 97 Ala. 88; 11 So. Rep. 740); the costs of such contest must be certified "to the clerk of the Circuit Court in which security for costs is required to be given, . . . and said clerk must thereupon issue execution for the same, returnable at the next term of the Circuit Court," &c., &c.; and said clerk is allowed specified fees for the issuance of original and alias executions.—Code, §§ 413, 414, 415; *Roney v. Simmons*, *supra*. And in a contest before a judge of the Circuit Court, the cause, at least for all the purposes of security and collecting costs, notice of contests, &c. &c., is pending in the Circuit Court, (Code, § 428), commissions to take testimony are issued by the clerk of the court, (Code, § 429), and depositions when taken are returned into said court, (Code, § 405. And so also in respect of a contest of an election to the office of judge of the Circuit Court before a chancellor: the case, for all purposes of costs and the like, is in the Chancery Court, and prosecuted through the process of that court issued by its register.—Code, §§ 429, 430, 431. And that all these contests are pending in the courts, judges of which try the issues involved in them, for all the purpose of security, judgment and execution for costs made more manifest by reference to certain general provisions applicable to all contests, and to certain provisions themselves applicable alone to contests tried by the prob-

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judge, but extended by other sections to contests before circuit judges and chancellors. Thus, section 398 of the Code provides, that the contestant must give security for costs, within a specified maximum limitation, "in such sum as the judge of the court in which the contest is to be tried may deem sufficient;" a clear recognition of the pendency of the contests in the court, the judge of which hears and determines it. Commissions to take testimony, where the contest is triable by a judge of probate, are issued by such judge, not as judge, but as performing the duties of clerk of the *Probate Court*.—Code, § 402. Proceedings against defaulting witnesses are issued out of, and returnable to a regular term of the *Probate Court*, and not by and before the probate judge except as a part of such court.—Code, § 420. And execution for costs issues out of the Probate Court, and must be made returnable to a *regular term of said Probate Court*.—Code, § 427. The execution for costs, in contests before chancellors, and circuit and probate judges, when the contestant fails, issues on the bond for costs, and against the contestant and his sureties. It is a process of the court. It is issued by the ministerial officer of the court—the register of the Chancery Court, the clerk of the Circuit Court, or the officer performing clerical duties in the Probate Court. It is returnable, not to or before the judge of the court, but to the court itself, to some *regular term* of the Chancery Court, Circuit or Probate Court, as the case may be. To hold that a bond, all the purposes and objects of which are to be worked out and accomplished through the processes of the court, and with reference to which nothing whatever is to be done, no action whatever is to be had, except by the court, does not belong to the files of the court, and should not bear a caption appropriate to its functions in the court, would be an anomaly too extraordinary for toleration. We can not subscribe to such a doctrine, but hold, with the court below, that the bonds in each of these cases belong to the records of the Probate Court as properly appears by their caption.

Affirmed.

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99	276
106	507

*Bill in Equity by Material-man, Claiming Statutory Lien,
against Prior Mortgagee.*

1. *Statutory lien of mechanics and material-men; what laws are of force.*—The statute approved February 12th, 1891, entitled "An act to provide liens for mechanics and material-men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041 of the Code, and section 3027 as amended by the acts of 1888-89," (Sess. Acts 1890-91, pp. 578-80), though capable of execution as a complete system in itself, is to be construed in connection with the unrepealed sections of the former law, making the law now of force to consist of the express provisions of the new statute and the unrepealed sections of the old law as amended or changed by the new.

2. *Same; jurisdiction of equity*—The jurisdiction of equity to enforce the statutory lien of mechanics and material-men (Code, § 3045), is not taken away by the later statute approved February 12th, 1891: and a material-man who has obtained a judgment at law on his claim, and become the purchaser of the property at a sale under it, may come into equity against a prior mortgagee of the property, who has also become the purchaser at a sale under his mortgage, to have the priorities of their respective liens adjusted, and the property sold for their satisfaction.

APPEAL from the City Court of Birmingham, in equity.

Heard before the Hon. W. W. WILKERSON.

The bill in this case was filed on the 4th November, 1892, by the May & Thomas Hardware Company, a private corporation, against the Birmingham Building & Loan Association, also a private corporation, and S. B. Ethridge. The facts are thus stated by HARALSON, J.:

"The allegations of the bill as amended show, that the May & Thomas Hardware Company, a body corporate, furnished to the defendant, S. B. Ethridge, by contract with him, building materials, for buildings and improvements on certain lots of land, owned by him, which are described as being in Avondale, Jefferson county; that on Nov. 6, 1891, said Ethridge and his wife executed a mortgage on said lots to the Birmingham Building & Loan Association, and on the 11th December, 1891, they executed a second mortgage to said association on said lots; that those mortgages were foreclosed by the association on September 15th, 1892,

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according to the power contained therein, and it became the purchaser of them, at the mortgage sale; that said improvements were erected on said lots in the months of November and December, 1891, and in the months of January, February, March, April and May, 1892, and the materials were furnished in the months of February, March and April, 1892, for which said Ethridge was indebted to complainant, the said May & Thomas Hardware Co., in the sum of \$180; that on the 18th day of May, 1892, the complainant filed a statement under the mechanics' lien law in the Probate Court of Jefferson county, and within six months brought suit in the Circuit Court of Jefferson county, against said Ethridge alone, on said claim, and on the 18th July, 1892, recovered a judgment against said Ethridge, in which judgment a lien on the property was declared in favor of complainant, and the property ordered sold for the satisfaction thereof; that under a *venditioni exponas*, issued in said cause, the sheriff sold said property on the 20th day of September, 1892, and the complainant became the purchaser thereof, at the price of \$50; that at the time of said sale and purchase by complainant—on the 26th Sept., 1892—the fact that defendant had foreclosed its said mortgage, and had become the purchaser of said property, was unknown to complainant. The bill prays for a reference to ascertain the value of the property at the time said materials and improvements were furnished, and its value afterwards; that a decree be rendered for its enhanced value by reason of materials furnished, and that the property be sold and the proceeds distributed between them, in accordance with the priorities and claims of said association and complainant, and for any further relief to which complainant may be entitled.

“The defendant association made a motion to dismiss the bill for want of equity, and demurred to it, on the grounds, that the court had no jurisdiction; that complainant had no lien on the property described, and that if it had any rights, it had an adequate remedy at law to enforce them. The court overruled said motion to dismiss, and the demurrers to the bill as well. Hence this appeal.”

E. J. SMYER, for appellant.

WADE & VAUGHAN, *contra*.

HARALSON, J.—Chapter 3, Part 3, Title 2 of the Code of 1886, headed, “*Liens of mechanics and material-men*,” provid-

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ed a system of statutory law on that subject, comprising 30 sections, from 3018 to 3048, inclusive. On the 12th February, 1891, the legislature passed "An act to provide lien for mechanics and material-men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041 of the Code, and section 3027, as amended by the acts of 1888-89."—Acts 1890-91, pp. 578-80. These sections, seven in number, were parts of the general mechanics', and material-men's lien law, leaving 24 of its sections still of force. In the place of these repealed sections, other provisions were supplied, forming with the unrepealed sections a system supposed to be more complete than the one that existed before. So far as we have observed, the old and the new are susceptible of harmonious adjustment; but, if not, the last section of the new provides "that all laws in conflict with the provisions of this act are hereby repealed," and in case of conflict the latter will prevail. There can be no question, then, that this later enactment was not intended to create an entirely new system of law on this subject, in abrogation of the old, but to amend the latter to the extent of the repeals indicated in its last section, and in its new provisions, and leave the balance to be adjusted to these amendatory provisions. While section 3018 of the Code, which declared the lien, is repealed, section 2 of the new enactment, which also declares it in more extended form, takes its place in the new system, and sections 3019 and 3048, not having been repealed, are to be applied to said section 2 of the amendatory law, as they were to section 3018 before its repeal. This was the view the court seems to have taken of the character of this statute in *Wimberly v. Mayberry*, 94 Ala. 251.—*Colby v. St. James (Colored) M. E. Church*, at present term, ante p. 259.

The supposed lack of equity in this bill is based on the contention, that section 3018 of the Code having been repealed, sections 3019 and 3048, upon which the right to maintain the bill depends, were necessarily repealed with it, since the two latter were inoperative without the former. But we have shown above that section 2 of the amendatory act of 1890-91, under which this case arose, took the place of said repealed section—3018—as an amendment of it, and said sections 3019 and 3048 became applicable to it immediately upon its enactment. This question being out of the way, the case of *Wimberly v. Mayberry*, *supra*, is decisive of the equity of this case.

The grounds of demurrer based, also, upon the supposed want of equity in the bill, must, for the same reasons, fail. Nor is there any merit in the other ground of demurrer, that

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the complainant had an adequate remedy at law. The suit in the Circuit Court was against Ethridge alone. The defendant company was not concluded in its liens, or in the assertion of their priorities, by any thing that took place in that proceeding; and the complainant, in having obtained said judgment against said Ethridge, and purchased said property at the sheriff's sale, was not precluded from filing his bill to settle with the appellant the priorities of their respective liens, as this bill is intended to do. There is no other adequate remedy, to adjust these competing liens, except a proceeding in equity.

There is no error in the rulings of the court below, and its decree is affirmed.

The State v. Calhoun.

Action on Forfeited Recognizance.

1. *Recognizance of witness taken by justice of the peace; amount and surety.*—On the preliminary investigation of a criminal charge, a justice of the peace has authority to require a witness for the prosecution to enter into a recognizance in a greater sum than \$100 for his appearance in court to testify; but he can not require the witness to give surety for his appearance, when he is a non-resident, or resides more than fifty miles from the place at which the examination is had (Code, §§ 4292-94); yet, the obligation being joint and several (§ 4427), the principal is bound by it, though no recovery could be had against the surety.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN B. TALLY.

The record in this case does not show how many of the defendants were served with process, nor how many appeared and pleaded; the judgment-entry only reciting that the cause was tried on issue joined, and that the jury returned a verdict for the defendants. The court charged the jury, on request, to find for the defendants if they believed the evidence; and this charge, to which the plaintiff excepted, is here assigned as error. The opinion states the material facts.

Wm. L. MARTIN, Attorney-General, for the State.

Wm. H. DENSON, *contra*.

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COLEMAN, J.—This is an action by summons and complaint, upon the following undertaking: "We, Patrick Calhoun," &c., "witnesses against J. D. Williamson and Jack King, charged with a public offense, do each agree to appear at the next Circuit Court of Cherokee county, to give evidence against J. D. Williamson and Jack King; and failing so to do, to pay the State of Alabama four hundred dollars. Dated this 30th Sept., 1887." This obligation was signed by the defendants, and approved by the justice of the peace who required the obligors to make bond for their appearance. The bond is framed in exact accordance with section 4293 of the Code.

The authority of the justice of the peace to require witnesses to enter into an obligation of the purport of the one sued upon is derived from, and finds justification alone in section 4294 of the Code, which is as follows: "Whenever the magistrate has good reason to believe that a witness for the prosecution will not appear to testify, he may order such witnesses to enter into an undertaking to appear and testify in a larger sum, and with sufficient sureties; but such surety must not be required from any witness who does not reside in this State, and within fifty miles of the place where the examination takes place."

The case was tried upon an agreed state of facts. They are, that the witnesses did not appear according to the bond, and that they were at the time, and have ever since remained citizens of the State of Georgia. It thus appears that the justice of the peace, in requiring the witnesses to enter into an undertaking under the section we have quoted, exceeded his authority, and imposed upon them an obligation not authorized by law. If the justice of the peace had required of the witnesses to enter into bond for their appearance, he might have done under section 4292 of the Code, in the sum of one hundred dollars, without surety, as he was therein authorized and required to do, the undertaking would have been valid, and upon breach of condition would have supported an action against them for that amount.

The words "in a larger sum," in section 4294, Code, *supra*, evidently refers to the sum of one hundred dollars, fixed in section 4292 of the Code; but when a larger sum is fixed, and surety is also required, the section itself limits the power of the justice to coerce suretyship to cases where the witnesses are residents of the State, and live and are residing "within fifty miles of the place where the examination takes place."

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Upon the agreed facts, the sureties were entitled to the general affirmative charge. Obligations of this character are joint and several.—Crim. Code, § 4427; *Kilgrow v. State*, 76 Ala. 101. The justice of the peace was authorized, under section 4294 of the Code, to demand a bond of the witness, in "a larger sum." The obligation was binding upon the principal, and as to him the State was entitled to recover.

Reversed and remanded.

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Bill in Equity for Cancellation of Mortgage.

1. *Husband and wife as parties.*—When the legal title to the homestead is in the husband, the wife can not properly be joined with him in a bill which seeks the cancellation of a mortgage of the land on the ground that it was not acknowledged by her on separate examination as by law required.

2. *Mortgage of homestead; acknowledgment by wife; conclusiveness of officer's certificate.*—When a mortgage, or other alienation of the homestead, is signed by husband and wife, and a certificate of acknowledgment, in due form, is appended by an officer authorized to take it, the certificate is conclusive as to the facts stated, unless impeached by proof of fraud or duress, in which the grantee participated, or of which he had knowledge or notice before he parted with the consideration; but, if there was in fact no appearance before the officer, or no acknowledgment whatever before him, that fact may be shown in avoidance of the certificate, and it renders the instrument void, even if the grantee is a purchaser for value without notice.

3. *Offer to do equity.*—When a mortgage is given for money borrowed, and the mortgagor afterwards seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest.

APPEAL from the Chancery Court of Bullock.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 30th March, 1892, by Wiley M. Grider and his wife, Mrs. Mary R. Grider, against the American Freehold Land Mortgage Company of London, a foreign corporation, and the Loan Company of Alabama, a domestic corporation; and sought to enjoin a sale of certain lands, claimed by the complainants as their homestead, under powers of sale contained in two mortgages executed by them, one to each of the defendant corporations, and to

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102	244
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107	371
108	281
109	551
110	408
99	281
115	426
99	281
118	563
119	183
99	281
121	577
99	281
124	667
124	669
99	281
128	317
99	281
128	631
99	281
135	357

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cancel the mortgages as a cloud on the title to the homestead lands. A copy of each of the mortgages was made an exhibit to the bill. The mortgage to the American Freehold Land Mortgage Company was given for money borrowed, as evidenced by several promissory notes signed by said Grider and his wife, and conveyed a tract of land containing 620 acres, embracing the 160 acres here claimed as homestead; contained a power of sale on default, and a covenant that said Grider was seized of an estate in fee simple in the lands. It purported to have been executed on the 3d October, 1890, and was attested by two witnesses; and to it were appended two certificates by M. F. McLendon, a justice of the peace, each dated October 9th, 1890; one being in the usual form for an acknowledgment of a deed by husband and wife, and the other an acknowledgment by the wife on separate examination apart from her husband. The mortgage to the Loan Company of Alabama conveyed the same tract of land, and purported to have been executed on the 9th October, 1890; and to it were appended two certificates by the same justice of the peace, dated on that day, and in the same form as the former mortgage. The bill asked relief against each of these mortgages only as to the 160 acres of land claimed as a homestead, and on the ground that Mrs. Grider never appeared before the justice of the peace, and never made any acknowledgment of her signature before him; and further, that she never signed the mortgage to the Loan Company of Alabama.

The American Freehold Land Mortgage Company demurred to the bill, (1) because Mrs. Grider was improperly joined as a complainant with her husband; (2-8) because the bill showed that the defendant corporation was a *bona fide* purchaser for value without notice, and the facts alleged were not sufficient to avoid the mortgage as to such purchaser; (9) because the bill contained no offer to do equity, by refunding the money borrowed, with interest. The Loan Company of Alabama also demurred to the bill, on the ground that Mrs. Grider was improperly joined with her husband as complainant. The court sustained the demurrer on all the grounds except the last, which was not noticed; and its decree is now assigned as error by the complainants.

TOMPKINS & TROY, and D. S. BETHUNE, for appellants.—
(1.) Under the allegations of the bill, the mortgages never had any legal validity, and could confer no rights even on an innocent purchaser for value without notice; nor could any

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estoppel arise under them, any more than from a forged instrument.—*Halso v. Seawright*, 65 Ala. 43 ; *Alford v. Lehman*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604; *Allen v. Lenoir*, 53 Miss. 321; *Michener v. Cavender*, 38 Penn. St. 334; *Smith v. Ward*, 1 Amer. Dec. 80; *Dodge v. Hollinshead*, 80 *Ib.* 433; *Pickens v. Knisely*, 6 Amer. St. 622, and cases cited in note on p. 643. (2.) The wife had such an interest in the lands as authorized her joinder with her husband.—*Vandleave v. Wilson*, 73 Ala. 387; *Lehman, Durr & Co. v. McGehee*, decided by special court composed of Judges SOMERVILLE, MCCLELLAN and THORINGTON. (3.) Other supposed defects in the bill, if any, are not presented by the assignments of error.

G. L. COMER, and NORMAN & SON, *contra*.—(1) Mrs. Grider was not a proper party complainant.—*Seamen v. Nolen*, 68 Ala. 463; *Vandleave v. Wilson*, 73 Ala. 387; *Skinner v. Chapman*, 78 Ala. 376. (2) Under the allegations of the bill, the defendants are to be regarded as purchasers for a valuable consideration without notice, and the certificate of the justice is conclusive of the facts therein stated—82 Ala. 318; 91 Ala. 374; 70 Ala. 357; 75 Ala. 216; 55 Ala. 338; 87 Ala. 589; 66 Ala. 600; 61 Ala. 246; 69 Ala. 102; 58 Ala. 211. (3) The mortgagors seeking equity should offer to do equity.—61 Ala. 514; 15 Ala. 51, 501.

HEAD, J.—Though, technically, the averment of the bill proper would seem to lay the ownership of the homestead, upon which the mortgages mentioned are alleged to cast the clouds sought to be removed, in the complainants, W. M. Grider, and his wife, jointly, yet in connection with the exhibits, we think it is intended to aver that the lands are the property of the husband solely. It is so treated in the argument of counsel on both sides, and so we will consider it. It is a case, then, of a wife joining in a bill with the husband, to remove a cloud from the title of the latter's homestead. The objection of misjoinder of complainants is raised by demurrer, and we are of opinion it is well taken, and that the bill cannot be maintained with Mrs. Grider as a party complainant. Having no title, legal or equitable, she has no standing in court to obtain such relief. *Seaman v. Nolen*, 68 Ala. 463. *Vandleave v. Wilson*, 73 Ala. 387, is not an authority to the contrary. It may be, that, if the title to the homestead is clouded, whereby the wife may suffer injury by the probable loss of its use and enjoyment as a homestead, and the husband refuses to take the necessary

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steps to have the clouds removed, she will be permitted, by virtue of her incidental interests in the land, as wife and member of the owner's family, to come into equity to have the title of the husband made clear. *Seaman v. Nolen, supra*. But such is not the scope or purpose of this bill. The husband is now seeking all the relief she could ask, and improperly joins her with him in the effort to obtain that relief. The demurrer for misjoinder was properly sustained.

An important question arising in this case is, what conclusiveness shall be accorded to the certificate of acknowledgment of the execution of a mortgage, made in due form, by an officer authorized by the laws of this State to take and certify such acknowledgments? The bill avers that Mrs. Grider, the wife, although she signed with her husband the mortgage to the American Freehold Land Mortgage Company of London (Limited), and although there is appended to the mortgage the certificate, in due form, of a justice of the peace, certifying her due acknowledgment of its execution; yet, in fact, she never made the said acknowledgment before said justice, or any other acknowledgment before any officer; that the justice of the peace was not present when she signed the mortgage, and never took any acknowledgment from her with reference to the execution of the same, and that said certificate of acknowledgment is wholly untrue. There is, in the bill, no charge of fraud or collusion on the part of any one, in procuring the certificate; and upon the averments, as we find them, it must be assumed that the mortgagee took the mortgage and parted with its money in reliance upon the truth of the certificate, without any notice of its falsity. The complainants contend that they are entitled to show the fact alleged to avoid the mortgage of the homestead, even against a *bona fide* mortgagee without notice. The defendant contends that they are concluded by the certificate.

It must be regarded as settled by the great weight of authority, that when the grantor or mortgagor appears before the officer, and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, the certificate is conclusive of the truth of all the facts therein certified, and which the officer was by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or of which he had notice at the time of parting with the consideration. The taking and certifying of the acknowledgment are held in many of the cases to be of a judicial nature, and when

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the officer has jurisdiction, so to speak, by having the party acknowledging, and the instrument to be acknowledged, before him, and enters upon and exercises this jurisdiction, the parties will not be allowed to impeach the truth of the facts which he is required by law to certify and does certify, in the absence of fraud or duress as above stated.—*London v. Blythe*, 16 Pa. St. 532; *Ib.* 27 Pa. St. 22; *Hall v. Patterson*, 51 Pa. St. 289; *Heeter v. Glasgow*, 79 Pa. St. 79; *Miller v. Wentworth*, 82 Pa. St. 280; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; *Schrader v. Decker*, 9 Barr, 14; *Williams v. Powers*, 48 Tex. 141; *Kocourek v. Marak*, 54 Tex. 201; *Rollins v. Menager*, 22 W. Va. 461; *Henderson v. Smith*, 26 W. Va. 829; *Moore v. Fuller*, 6 Oregon, 272; *Graham v. Anderson*, 42 Ill. 514; *Lickmon v. Harding*, 65 Ill. 505; *Calmut & Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666; *Stone v. Montgomery*, 35 Miss. 83; *Miller v. Marx*, 55 Ala. 322; *Cahal v. Citizens' Mutual Building Association*, 61 Ala. 232; *Moog v. Strang*, 69 Ala. 98; *Downing v. Blair*, 75 Ala. 216; *Griffith v. Ventress*, 91 Ala. 366; *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315.

In *Halso v. Seawright*, 65 Ala. 431, however, where the question was, whether the clerk of a probate judge was authorized to take and certify an acknowledgment, the act was held to be of a ministerial and not judicial nature, and that, therefore, the clerk was authorized; but in the later case, of *Griffith v. Ventress*, *supra*, this court, without referring to *Halso v. Seawright*, declared it to be a judicial act, and this may now be regarded as the settled doctrine of this court. In *Shelton v. Aultman & Taylor Co.*, *supra*, it was contended by counsel, upon the authority of *Halso v. Seawright*, that the decisions sustaining the conclusive character of the certificate should be overruled; arguing that as the officer acts in a ministerial capacity, as held in *Halso v. Seawright*, parol evidence should be admitted to falsify the certificate in any and every respect; but the court, speaking by Justice CLOPTON, said, that whatever may be the capacity in which the officer acts, the rule as established may now be regarded as a rule of property, which it would be unwise and unsafe to disturb.

It must, therefore, as we have said, be considered as settled, that where the grantor has appeared before the officer, and an acknowledgment of some kind has been taken, the certificate of the officer in due form, whether he acts ministerially or judicially, is conclusive of the facts certified, and which he is by law authorized to certify; but the same may be impeached for duress or fraud in which the grantee or

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mortgagee participated, or had notice of before parting with his money.

We have examined a great many authorities, and find only the following wherein the question we are now called upon to decide—viz., what effect shall be accorded to the officer's certificate, when the allegation is that the party never in fact appeared before the officer, or made any acknowledgment at all—was raised or adjudicated.

In *Michener v. Cavender*, 38 Pa. St. 334, the officer certified to the wife's acknowledgment. She in fact never appeared before him, or acknowledged the mortgage in any manner. The mortgagee was innocent. The court, recognizing the general rule above stated, in cases where there was an actual acknowledgment, ruled that the wife was not bound by the certificate, and discussed at some length the rights in such a case of the mortgagee, as a *bona fide* purchaser without notice. The judge said, *inter alia*, "To call the mortgagee a *bona fide* purchaser, and put her to proof that he knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would therefore be worthless to the forger. Counterfeit notes would never be issued, if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine? . . . To carry the doctrine of notice to such extent, would subvert all law and justice. A purchaser of real estate, who finds the deeds in the channels of the title all duly acknowledged, is certainly not required to go up the stream, and inquire of every married woman if she executed her deed voluntarily, and acknowledged it according to law; and if he pay his money on the faith of such title deeds, he is to be protected; and this probably is all that was meant by what judges have said about purchasing without notice."

In *Allen v. Lenoir*, 53 Miss. 321, the wife signed, but never in fact acknowledged the mortgage, or went before the officer, as his certificate affirms she did. Judge Campbell said: "We cannot escape the conclusion, after an earnest effort to avoid it, that the mortgage was never acknowledged by Mrs. Lenoir, and that the certificate that she had acknowledged it is untrue. A proper acknowledgment is an essential part of the execution of a conveyance of her

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land by a married woman. . . . The decree, being based on the mortgage, is erroneous." And in *Johnston v. Wallace*, *Ib.* 331, the same judge adhered to this view, and, upon a review of the authorities, distinguished such a case from the case where an acknowledgment of some kind was made, but assailed because not made, in respect of its details, in the manner required by law.

In *Borland v. Walrath*, 33 Iowa, 130, the wife neither signed nor acknowledged the mortgage, and the court held the certificate, which as to her was in due form, open to attack. The case, however, is unsatisfactory as authority on the point we are considering, since no allusion is made to the question of *bona fides* or notice, on the part of the mortgagee; nor does it appear from the facts that he was a *bona fide* mortgagee without notice of the falsity of the certificate.

In *Smith v. Ward*, 2 Root, 374 (1 Amer. Dec. 80), it was held that parol evidence is admissible to prove that the grantor did not appear before the certifying officer and make acknowledgment; but, like the case last cited, the discussion is meagre, and makes no reference to the rights of *bona fide* purchasers.

In *Meyer v. Gossett*, 38 Ark. 377, the court held, that where there is no appearance before the officer, and no acknowledgment in fact, the officer's false certificate of acknowledgment is void *in toto*; but the distinction was closely drawn, that where there are an appearance and acknowledgment in some manner, the certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition brought home to the grantee. It appeared that the grantee was a purchaser for value without notice of the falsity of the certificate. That case was adhered to in *Donahue v. Mills*, 41 Ark. 421.

In *Williamson v. Carlsadden*, 36 Ohio St. 664, the general rule as to conclusiveness of the certificate is recognized, but the court say: "If it is true, as alleged by the defendants, . . . that they never appeared before the officer, or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defense, it is not necessary to show that the mortgagee had notice of such fraud. In fact, the governing principle is very broad. Thus, it has been held that in an action on a recognizance, which is regarded as a record, a plea in bar that the defendant did not

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acknowledge the recognizance is sufficient; and however it may be as to the right to attack a judgment on the ground that there was no jurisdiction over the person, it is not denied that, in a proper case, a judgment may be directly impeached on that ground."

In *Mays v. Hedges*, 79 Ind. 288, it was held that a certificate of acknowledgment to a deed, made by the officer, merely on the assurance of another that the party executed it, is a nullity.

In *Pickens v. Knisely*, 29 W. Va., 1 (6 Am. St. Rep. 622), we have a very full and ample discussion of this subject, upon a review of the authorities, and the conclusion reached was, that the certificate of acknowledgment of a deed by a married woman may be impeached and avoided, by proving that she never in fact appeared before the officer, or acknowledged the deed to him; and that this rule will be enforced against an innocent purchaser without notice. But, if she appeared before the officer for the purpose of making the acknowledgment, and attempted to do in some manner what the law required to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers. In a dissenting opinion, Judge Green took strong ground against this conclusion. He maintained that the act of the officer is judicial, and likened it to the entry of a fine, and said: "It only remains to inquire whether, if the entry on the record book of a court of general jurisdiction, and which court only could enter a fine, was that the married woman personally appeared before the court and acknowledged the fine in the appropriate manner, she could, by parol evidence, contradict this statement on the record book. I think it well settled that she could no more contradict the statement on the record that she personally appeared before the court, than she could contradict the further statement on the same book of such court that she acknowledged the fine in the proper manner."

In line with this dissenting opinion, *Kerr v. Russell*, 69 Ill. 666, held that the statute authorizing certain officers to take the private acknowledgment of a wife to a conveyance, is a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, may be guarded, and on the other, the rights, of the grantee may be assured; that, as a fine and recovery at common law was subject to impeachment for fraud, so the certificate of acknowledgment of a deed by a wife may be impeached; but the proof to sustain such a charge must be of the clearest, strongest, and most convincing character,

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and by disinterested witnesses; that an innocent purchaser of land has a right to rely upon the record of a deed which shows upon its face that the wife has executed and properly acknowledged the deed with her husband; and the wife will not be allowed to avoid the same, as to such purchasers without notice, by showing her signature to be a forgery, and that she never in fact acknowledged the same. The court, in the opinion, discuss the subject at length, and give strong and cogent reasons for the decision. There are other Illinois cases in support of this: *Graham v. Anderson*, 42 Ill. 514; *Lickmon v. Harding*, 65 Ill. 505; *Calumet & C. C. & D. Co. v. Russell*, 68 Ill. 420.

In *Barnett v. Proskauer*, 62 Ala. 486, the wife neither signed nor acknowledged the mortgage assailed, but the husband, without her knowledge or consent, signed her name and made the acknowledgment. It does not appear whether the mortgagee was a *bona fide* purchaser without notice of the actual non-execution of the mortgage by the wife, and falsity of the officer's certificate, or not. That question was not raised. In the opinion, Brickell, C. J., said: "The certificate of acknowledgment, or proof of probate, taking the places of proof by the subscribing witnesses, or of the handwriting of the grantor, may also be contradicted, and parol evidence is admissible to falsify it. It is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution." And it was held the wife was not bound.

In *Cahall & Pond v. Citizens' Mut. Building Asso.*, 61 Ala. 232, it is said, *obiter dictum*, "The certificate of the notary could not be impeached without showing the signature of the wife was forged, or that she was subject to duress, or that fraud was practiced on her, with the knowledge of the grantee."

In *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315, Justice CLOPTON, speaking for the court, construed the language we quoted above from *Barnett v. Proskauer*, 62 Ala. 486, to mean that, as to the *execution of the conveyance*, the certificate may be disproved in all cases; and in the opinion he said: "The rule settled by the decisions is, that as to all matters except the *execution* of the conveyance, the certifi-

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cate, when substantially conforming to the statute, is conclusive, unless impeached by allegation and clear proof of fraud or imposition practiced on the wife, in which the officer or grantee participated." In that case, it may be seen, there was no question raised as to the actual signing of the conveyance by the wife, or the total want of an acknowledgment by her. The objection made was, that she was not examined *separate and apart from the husband*; so that the distinction drawn by the judge between the *execution* of the conveyance and other matters, may be said to be *dictum* merely. Moreover, we think the judge misinterpreted the language of *Barnett v. Proskauer*. It was, we think, a mere statement of the burden of proof as to the fact of execution, when that fact was the matter in issue. The language was: "The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution."

From the foregoing review of the authorities, we must realize that the question we are called upon to decide is by no means free from difficulty. We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them; yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another.

Under the laws of this State, the official examination and acknowledgment of the wife prescribed by the statute, and duly certified by the officer, are essential and indispensable parts of the valid execution of a conveyance of the husband's homestead. Without them there is no execution of the conveyance. It matters not how formally signed, and abundantly attested, if these statutory requisites are wanting, the conveyance is a nullity. In *Allen v. Lenoir*, 5 Miss., *supra*, the court said: "A proper acknowledgment is an essential part of the execution of a conveyance of homestead by a married woman;" and this court in *Griffith v. Ventress*, *supra*, quoted approvingly a similar utterance of

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the same court in *Harmon v. MaGee*, 57 Miss. 414. The objection to the mortgages, therefore, made by the present bill, essentially is, that they were never *executed*, so far as they affect the homestead.

Upon due consideration, we are of opinion that the better rule, and the one sustained by the weight of authority, is, that when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers. We approve the rule as it is stated in 1 Am. & Eng. Encyc. of Law, p. 160, § 6: "When there is no appearance before an officer, his false certificate of acknowledgment is void; but, when there is an appearance and acknowledgment of it in some manner, then the official certificate is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee." This must be taken with the qualification, that the certificate is conclusive only of the facts the officer is by law authorized to certify.

What we have said applies with greater force to the mortgage to the Loan Company of Alabama, sought by the bill to be set aside, since the allegation is that that instrument was neither signed nor acknowledged by Mrs. Grider.

It follows that, aside from the misjoinder hereinbefore noticed, there is equity in the bill, upon sufficient allegations, to vacate the two mortgages mentioned, so far as the homestead is concerned, unless the bill is deficient, as insisted in the demurrer, for its failure to offer to do equity, by offering to pay to the mortgagees the amounts received under and by virtue of the mortgages.

We are of the opinion this ground of demurrer is well taken. We held in *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163, and again in *New England Mortgage Security Co. v. Powell*, 97 Ala. 483, that a complainant seeking to cancel, as a cloud on his title, a mortgage executed by him to a foreign corporation, for money loaned, on the ground that the mortgage was void because the corporation had not complied with the laws of this State authorizing it to do business here, or because the mortgage, being governed by the laws of New York, was void for violation of the usury laws of that State, must offer in his bill to repay what he had received under and in faith of the mortgage security, as a condition of the relief sought. We intend to

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adhere to that doctrine. We can not assent to the proposition, that a person can obtain another's money upon the faith and assurance of a mortgage security, and the next moment after he receives and appropriates it, go into a court of conscience, where the maxim that he who seeks equity must do equity has ever been vigorously upheld and applied, and ask that court to cancel the security as a cloud on his title, still retaining the money and making no offer to return or repay it. If Grider needs and desires the aid of a court of chancery to clear his title of the void incumbrances, he must offer to repay the money he received, with lawful interest. If he is unwilling to do this, he must stand upon his rights at law. Equity will not help him.

The ground of demurrer last considered, being well taken, should have been sustained.

The chancellor erred in sustaining the demurrer on the ground assigned, that the certificates of acknowledgment were conclusive. The complainants may amend the bill within thirty days, with power in the court below to extend the time, if necessary.

Reversed and remanded.

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Bill in Equity between attaching Creditors at Law, to set aside prior Fraudulent Attachment, and determine Priority of Liens of subsequent Attachments.

1. *Lien of attachments levied on same property.*—When two or more attachments are levied on the same property, but on different days, the lien of each dates from its levy, and is subordinate to those levied prior to it; and if all the suits are reduced to judgment, they must be paid in the order of their respective levies.

2. *Same; when aid of equity is invoked to set aside prior attachment fraudulent.*—If the attachment first levied is attacked by the subsequent attaching creditors, by bills in equity, on the ground of fraud and collusion between that creditor and the debtor, and decrees are obtained setting it aside on that ground, the respective liens of the complainants are not affected by the date on which their bills were filed, but are governed, as at law, by the priority of the levy of the respective attachments.

3. *Multifariousness; misjoinder; laches in filing bill.*—When several attachments are successively levied on a stock of goods, on which prior attachment has been levied by a person also claiming to be

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a creditor, and each of the subsequent creditors then files a bill in equity to set aside the prior attachment on the ground of fraud and collusion between the plaintiff and the debtor; the bill of the creditor whose attachment was first levied being filed last, making the other attaching creditors parties defendant, and claiming priority of payment because his attachment was first levied; it is neither multifarious, nor demurrable for misjoinder of parties; nor is he guilty of culpable *laches* in not filing his bill until after the lapse of eighteen months from the levies, when it appears that the money arising from the sale of the attached goods has been retained in the hands of the sheriff under injunctions issued under the former bills, but it is suggested that the several cases be consolidated.

APPEAL from the City Court of Decatur, in equity.

Heard before the Hon. Wm. H. SIMPSON.

The bill in this case was filed on the 19th day of October, 1891, by Voorhees, Miller & Rupel, a mercantile firm doing business in Cincinnati, Ohio, as creditors of Isaac Pinkus, lately carrying on a mercantile business at Decatur, Alabama, under the name of I. Pinkus & Co., against Herbert Cartwright, said Pinkus, the sheriff of Morgan county, and several other creditors who had levied attachments on the stock of goods of their said debtor—viz., Bamberger, Bloom & Co., Lowenheim, Seinsheimer & Kahn, and Marks Bros. & Marks. The facts were thus stated by Judge HARALSON, who delivered the opinion of the court:

"The averments of the bill are, that Isaac Pinkus, a merchant in Decatur, Alabama, doing business under the name of I. Pinkus & Co., had been buying goods from complainants during the years 1889 and 1890, and on the 1st of March, 1890, owed them a balance on their purchases of \$975.30, as evidenced by their three promissory notes, for \$314.95 each, of date 20 February, 1890, payable in 30, 60 and 90 days, respectively, and a verified account of \$30.50; that prior to March 1, 1890, said Pinkus was heavily indebted to others besides complainants, and was, in fact, at that time insolvent; that long prior to that date, Herbert Cartwright had been a trusted employé and confidential clerk of said Pinkus, and knew his financial condition, and that he was insolvent; that during the latter part of February, and early in March, 1890, said Pinkus secretly removed from his store a considerable portion of his then stock of goods, with the intent to hinder and delay his creditors in the collection of their obligations against him, and with the intent to defraud them; that in pursuance of this fraudulent intent, he entered into a conspiracy with his said clerk, Cartwright, the result of which was, that said Cartwright sued out an attachment against said Pinkus & Co., from the City Court of Decatur, for a pretended debt from said

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Pinkus & Co. to him, of \$9,500, and caused said attachment writ to be placed in the hands of the sheriff of Morgan county, and to be levied on the merchandise, goods, chattels and estate of said I Pinkus & Co., and taking the same into his possession, proceeded to sell the same, and converted them into money; that said pretended indebtedness of said Pinkus & Co. to said Cartwright,—except as to a small part thereof, the exact amount of which the complainants were unable to state,—was simulated, fictitious, and not a *bona fide*, honest debt, but was conceived for the purpose of fraud, and with the intent to defraud the creditors of said I. Pinkus & Co.; that on the 4th March, 1890, subsequently to the attachment of said Cartwright, complainants, also, sued out a writ of attachment from said City Court of Decatur, against said Pinkus & Co., to collect their said debt against said Pinkus, and placing it in the hands of the sheriff, caused the same to be levied, that day on the same property on which the attachment of said Cartwright had been levied; that subsequently they obtained a judgment in said City Court in said attachment suit against said Pinkus & Co., for \$1,005.50, besides \$20.75, costs of suit; that said Pinkus & Co. had no other property besides that levied on, which was liable to execution, and that was not sufficient to pay the amount of said pretended claim of said Cartwright; that subsequent to complainants' said attachment, and to the levy of the same, other creditors—Bamberger, Bloom & Co., Lowenheim, Seinsheimer & Kahn and Marks Brothers & Marks—sued out attachments, also, out of said City Court, against said Pinkus & Co., and caused them to be placed in the hands of the sheriff, and levied on the same property that the attachments of said Cartwright and of complainants had been, before that time, respectively levied, which were all levied subsequent, and subject to complainants' said attachment; that said parties, each, also filed a bill in equity, in said City Court for the purpose of setting aside the attachment, of said Cartwright, and its levy on said property, as being fraudulent and void as to the creditors of said Pinkus & Co., and in these suits the sheriff was enjoined from paying over the money realized from the sale of the goods, under the attachment of said Cartwright, and it is now in the custody of the sheriff, subject to the orders of the court. These complainants do not appear to have been made parties defendant to said suits. The prayer of the bill is that the attachment of said Herbert Cartwright be declared fraudulent and void; that complainants said claim against

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defendant Pinkus be first paid out of the proceeds of said sale; that the sheriff be enjoined and restrained from paying out any of said money, until complainants' said judgment and costs are first paid, and for general relief."

A demurrer to the bill was filed by each of the creditor firms who were made defendants, assigning as grounds of demurrer, (1) that the bill was multifarious; (2) that there was a misjoinder of defendants; (3) that the complainants were not entitled to priority over the other attaching creditors who had first filed bills to set aside the attachment of Cartwright; and (4) that the complainants were guilty of laches in not filing their bill at an earlier day, and had thereby lost any priority of lien they had acquired by the prior levy of their attachment. The City Court overruled the demurrers, and its decree is now assigned as error.

HUMES, SHEFFEY & SPEAKE, and W. R. FRANCIS, for appellants.—(1.) The bill is demurrable for multifariousness, and also for misjoinder of parties defendant. It has a double object and purpose, and improperly joins as defendants parties who have no common-interest in the subject-matter. *Adams v. Jones*, 68 Ala. 117; *Boyd v. Hunter*, 44 Ala. 705; *Monroe v. Hamilton*, 47 Ala. 217; *Harden v. Swoope*, 47 Ala. 273; *Randall v. Boyd*, 73 Ala. 282; *Bolman v. Lohman*, 74 Ala. 507. (2.) The transactions between Cartwright and Pinkus, though fraudulent as against creditors, were valid and binding as between themselves; and after the levy of Cartwright's attachment, there was no interest remaining in Pinkus which was subject to the levy of attachments at law at the suit of other creditors. Their remedy was a bill in equity, in the nature of an equitable attachment; and the creditor first filing his bill acquired a prior lien.—*Cartwright v. Bamberger, Bloom & Co.*, 90 Ala. 405; *Matthews v. Mobile Mutual Insurance Co.*, 75 Ala. 85; *Lucas v. Atwood*, 2 Stew. 378. (3.) If the complaints ever had any right of priority over the other attaching creditors, they have lost it by their undue delay in filing their bill.—*W. U. Tel. Co. v. Judkins*, 75 Ala. 428; *Cowan v. Sapp*, 74 Ala. 44; *Dargan v. Warring*, 11 Ala. 988; *Turner v. Lawrence*, 11 Ala. 426; *Mathews v. Mutual Insurance Co.*, 75 Ala. 85.

E. W. GODBEY, *contra*.—(1.) A prior lien on the property attached was acquired by the prior levy of the complainants' attachment at law, and the aid of a court of equity is only invoked to aid and give effect to that lien.—*Cartwright v. Bamberger, Bloom & Co.*, 90 Ala. 406; *Mathews v. Insurance Co.*, 75 Ala. 85; *Adams' Equity*, *255; *Waples on Attach-*

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ment, 295. (2.) There has been no culpable *laches* in the filing of complainant's bill, and no injury has accrued by their delay, since the money is still in the hands of the sheriff awaiting distribution. (3.) All the parties to the bill are interested in the distribution of the fund in litigation, and are proper parties.—*Adams v. Jones*, 68 Ala. 119.

HARALSON, J.—It is provided by statute in this State, that the levy of an attachment creates a lien in favor of the plaintiff.—Code, § 2957. This lien is inchoate until judgment is obtained in the attachment suit, when it becomes specific and fixed, and dates from the levy of the attachment. The levy places the property in the custody of the law, and the lien it creates can not be divested or overridden by any subsequent lien. When there are writs of attachment subsequent to the first, each differing in date of levy, and all levied on the same property, each subsequent one is levied in subordination to the ones that precede it, and the lien of each, dates from the moment of its levy; and if all are prosecuted to judgment, they must be paid, in the order of their respective levies.—1 Brick. Dig. 161; 3 Brick Dig. 58; Drake on Attach., §§ 225, 228.

When Cartwright sued out and levied his attachment on the property of I. Pinkus, the law gave him a lien on it, from the time of its levy, subject to be divested at law, only on failure to prosecute his attachment to judgment, and to become fixed, if and when he obtained such judgment. This lien of an attachment is a legal, in contradistinction to an equitable lien. It is in all respects similar, in character, to an execution lien, the one being general, and the other specific; each is acquired at law, and not through the instrumentality of a court of equity. The execution lien, so long as the creditor keeps it alive, by renewals, placed in the hands of the sheriff, can not be defeated or impaired by the activity of other creditors who may have acquired junior liens. And so, no junior attachment lien can override its senior, which is subject to no infirmity to make it void.

In this case, there were several attachments levied, subsequent to Cartwright's, on the same property. The complainants' was prior to the others, in date of levy; and, the attaching creditors, subsequent to Cartwright, including complainants, have a common interest, and are proceeding, to defeat Cartwright's, on the same ground, namely, that it was issued on a simulated debt, and was intended to defraud the creditors of Pinkus, their common debtor. They each have filed a bill, to remove this alleged fraudulent attach-

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ment, so as to displace it in favor of their own. However it may have been held elsewhere, it is the settled practice in this State, that in an attachment suit at law, another creditor can not intervene by petition, and be made a party to the suit, in order that he may attack the proceedings on the ground of fraud, or fraudulent collusion between the attaching creditor and the debtor.—*Cartwright v. Bamberger, Bloom & Co.*, 90 Ala. 405. And it was held in that case, that a junior attaching creditor had a right to invoke the aid of a court of equity, in a bill filed against the prior fraudulent attaching creditor, to declare his attachment fraudulent, and have it set aside, to make his lien, already fixed at law, operative against such fraudulent obstruction. The purpose of a bill of the kind can not be to have a lien declared, but simply to aid in carrying into effect one already created and existing at law—*Drake on Attach.*, § 225. In discussing this principle in another case, in its application to execution liens, which is apposite to the case in hand, we said: "A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and, whenever there is a direct rule of law, governing the case in all its circumstances, the court is as much bound by it, as would be a court of law, if the controversy was there pending. The court comes as an auxiliary to give effect to, and render more available, legal liens, not to displace them, nor to subvert their order of priority, which the law has established." And it was further said, that a junior judgment-creditor, proceeding in a court of equity for the removal of fraudulent conveyances or transfers of property, subject to execution at law, does not acquire a preference over senior judgment-creditors, who have the prior liens at law.—*Mathews v. Mobile M. Ins. Co.*, 75 Ala. 85. No reason can be assigned for the application of this principle to execution, and not to attachment liens.

If the complainants and the defendants were in a court of law, which was proceeding to direct the sheriff in the distribution of the proceeds of the sale of this property, among the attaching creditors, they would be entitled to priority of payment according to the date of their respective levies. It is the duty of a court of equity, in this respect, to follow the law.

If Cartwright's attachment was fraudulent, and was intended, as is alleged, to transfer the property levied on from Pinkus to him, it had the same effect as a fraudulent conveyance, and no equity remained in Pinkus; for, as between him and Cartwright, the transaction was absolute and irre-

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vocable. But, as between them, on the one side, and the creditors of Pinkus, on the other, the transaction would be void; and this bill, and those filed by the other creditors are aimed, not at any supposed or real equity remaining in Pinkus, but to wrest the whole title from Cartwright and Pinkus, and subject the property, or its proceeds, to the superior liens of the creditors whose attachments have been in good faith sued out, to enforce the collection of their debts.

The contention, therefore, of the defendants, that the interest of Pinkus & Co. in the stock of goods, seized under the fraudulent attachment of Cartwright, the moment the attachment was levied, became an equitable estate for the benefit of *bona fide* creditors, and that, therefore, it became a race of diligence between the creditors as to which of them would first take advantage of this equitable right and secure a first lien on the goods, or the proceeds of their sale, by filing a bill in a court of equity for that purpose, does not find sanction, it would seem, either in principle or authority. If no attachment had been sued at law, and no liens there created, the principle contended for, might be applied, but it is inapplicable to this case.

Enough has been said, already, to indicate that the common plainants and other attaching creditors, defendants, have a common interest to overthrow the alleged fraudulent lien of Cartwright. They have a common tie that far; and whether the lien of the one or the other, as between themselves, is to have priority, it is a matter of common concern, growing out of the same alleged fraudulent transaction between Cartwright and Pinkus, and the legal relations of the creditors respectively, to that transaction, that it shall be annulled and held for naught. It can not be said that the bill, having for its object the setting aside of said fraudulent attachment and attempted transfer of the property of the common debtor, and the adjustment of these competing liens for the money in the hands of the sheriff—matters springing from the same transaction, and in which all the parties are interested—is multifarious, or that there has been an improper joinder of defendants. Though their claims against Pinkus are distinct, there is a contention between them as to priority out of a common fund, and it is necessary for common plainants' relief, and proper for the relief of each, that they all be brought before the court, that their competing priorities may be rightly and finally adjusted.—*Stone v. Knickerbocker Life Ins. Co.*, 52 Ala. 589; *Adams v. Jones*, 68 Ala. 117.

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From the developments in this case, we venture the suggestion to the lower court, of the propriety of making an order consolidating with this case the other causes pending in equity in said court, touching the same matters here involved for determination, and try them all together as one case. The settlement of the matters in dispute will thereby be speedier and more satisfactorily adjusted, and at less expense.

In *Cartwright's Case*, *supra*, we said, "It has been adjudged, and needs no argument to justify the conclusion, that the summary jurisdiction exercised by a court of law, in determining the priorities of the legal liens of rival attaching creditors, whether on the motion of the sheriff, or of the parties themselves, asking for a distribution of the fund arising from the sale of the attached property, in no manner interferes with the jurisdiction of equity to adjust the rights of such rival claimants, in a proper case for cognizance by a court of equity.—*Gusdorf & Co. v. Ikelheimer & Co.*, 75 Ala. 148."

The other contention of the defendants, that the complainants are barred of their lien because of their supposed *laches* in filing this bill, can not be sustained. In what respect have defendants been prejudiced or injured by any delay of the complainants? The money, the proceeds of the goods, was early tied up in the hands of the sheriff; the defendants made haste to file their bill for that purpose, and to distance the complainants in that mistaken race for priority; and, if complainants, feeling safe in their position, delayed some time, but not so long as to damage any one, before they filed their bill, they ought not, for the short time that is pleaded as *laches* against them, to be deprived of the right which the law awards them, for their superior diligence in having first sued out their attachment—the real and legal struggle for priority. The *laches*, to be available, must be culpable.

Nor is there any merit in the grounds of demurrer, that the bill fails to show that there has been a final determination of the suits between the other defendants and said Pinkus and Cartwright. It does not appear that the complainants were parties to those suits, nor that their decision would bind them.

We find no error in the decree of the chancellor overruling the demurrers to the bill, and it is affirmed.

[Slappey v. Hodge Bros.]

Slappey v. Hodge Bros.*Bill in Equity for Injunction of Judgment at Law.*

1. *Equitable relief against judgment at law, on ground of accident or mistake.*—A court of equity will not grant relief against a judgment at law, on the ground that, by accident or mistake, it was rendered for a greater amount than was due. when it appears that the defendant, when served with process, put the papers in his pocket without reading them, did not show them to his attorney, but told the attorney that he was sued for the sum which he admitted to be due, and the attorney thereupon consented to the rendition of the judgment as claimed, not knowing that the amount was greater than his client admitted to be due.

APPEAL from the Chancery Court of Lee.
 Heard before the Hon. S. K. McSPADDEN.

J. J. ABERCROMBIE, for appellant, cited *Johnson v. Ogilby*, 2 Eq. Cas. Abr. 31; *Chesterfield v. Jansen*, 2 Vesey, 155; *Barlett v. Salmon*, 6 D. M. & G. 40; *London Assurance Co. v. Moses*, 11 L. T. 532.

A. & R. B. BARNES, *contra*, cited *Noble v. Moses Bros.*, 7 Ala. 604; 3 Brick. Digest, 347, §§ 347-50.

McCLELLAN. J.—The object of the present bill, which is prosecuted by Slappey, is to enjoin the enforcement and collection of a money judgment recovered against him by Hodge Brothers in the Lee Circuit Court. Its averments make the following case: Complainants owed defendant about three hundred and twenty-five dollars, evidenced by a promissory note. This was a balance left unpaid of a originally larger indebtedness. Hodge Brothers brought their action in the Circuit Court for the amount of this original debt. Summons and copy of the complaint were regularly served on Slappey, the defendant. He, as the bill alleges, “carelessly put the summons and complaint in his pocket, and never read it; he told his attorney of it, but did not show the summons and complaint to him, but informed him, said attorney, that the suit was for said three hundred and twenty-five dollars and no more.” The trial term of the case coming on, his attorney was, by leave of the court, absent in attend

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ance upon a court of another State, but before his departure he consented with the attorney for plaintiffs, or there was an agreement between them, that judgment should be rendered for plaintiffs. This consent was given, or this agreement was entered into, by Slappey's attorney under the supposition and belief on his part, induced by frequent statements of his client to that effect, that the suit was for the said sum of three hundred and twenty-five dollars, and he therefore thought that he was consenting and agreeing to the rendition of a judgment in that amount. In pursuance of this consent and agreement judgment was in fact had for the larger amount claimed in the complaint.

The bill contains no averment, or intimation even, of any fraud on the part of plaintiffs in procuring the judgment. They were in no wise responsible for the erroneous supposition indulged in by the defendant and his attorney as to the amount claimed in the action, nor were they aware of this misapprehension on the part of defendant's attorney, or of his consent to judgment being given with reference thereto. The bill is manifestly without equity. While it alleges a meritorious defense as to a part of the demand for which judgment passed, and tenders that part as to which no defense existed, it not only fails to negative fault on the part of complainant in respect of making his defense in the Circuit Court, but, to the contrary, affirmatively shows that his failure to defend was the result of his own omission, fault or neglect; and there is an utter absence of averment of any fraud or any act on the part of the plaintiffs to which defendant's failure to defend can be attributed. There was, therefore, no error in the decree of the Chancery Court sustaining demurers to the bill and granting the motion to dismiss it for the want of equity.—3 Brick. Dig., p. 347, §§ 230, *et seq.*, *Noble v. Moses Bros.*, 74 Ala. 604; *Watts v. Frazer*, 80 Ala. 186; *Hall v. Pegram*, 85 Ala. 522.

Affirmed.

[Ex parte Rand.]

Ex parte Rand.

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Application for Discharge from Custody on Habeas Corpus.

1. *Delay in execution of sentence.*—A defendant in a criminal case convicted of a misdemeanor and sentenced to perform hard labor for the county, is entitled to be discharged from custody on *habeas corpus*, if there is unreasonable delay in the execution of the sentence; and in this case, his detention in jail for twenty-two days after sentence, without sufficient excuse or explanation, is held unreasonable delay.

Application by petition in the name of Jim Rand, for the writ of *habeas corpus* to procure his discharge from the custody of the sheriff and jailor of Lauderdale county, who held him under a judgment and sentence rendered by a justice of the peace of said county. The application was first made to the Hon. W. B. McCURE, probate judge of the county, who refused to discharge the petitioner; and a bill of exceptions being reserved to his ruling, the application is renewed to this court.

JOHN T. ASHCRAFT, for the petitioner, cited *Ex parte King*, 82 Ala. 59; *Ex parte Crews*, 78 Ala. 457; *Kirby v. State*, 62 Ala. 51.

WM. L. MARTIN, Attorney General, *contra*.

COLEMAN, J.—On the 8th of December, 1892, Jim Rand was tried and convicted upon a charge of assault and battery, and sentenced to perform hard labor for the county. Being detained in jail by the sheriff, on the 30th of December, 1892, he sued out a writ of *habeas corpus*, alleging among other things that he was wrongfully and illegally detained in the county jail by the sheriff. The facts are undisputed, and there are no circumstances or reasons given why the petitioner has been thus detained in jail for so long a time after his conviction and sentence. Under the following authorities, it was the duty of the probate judge to grant the writ, and upon hearing to have discharged the prisoner.—*Ex parte Crews*, 78 Ala. 457; *Kirby v. State*, 62 Ala. 51; *Ex parte King*, 82 Ala. 59.

There are other irregularities in the proceedings, but it is unnecessary to notice them.

The writ of *habeas corpus* will be awarded, unless the petitioner is content to renew his application before a court or judge of primary jurisdiction.

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Jennings v. Pearce.

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Attachment and Garnishment.

1. *Assignment of cause of action in pending suit.*—The plaintiff in a pending suit, having assigned the cause of action, or an interest therein, may afterwards dismiss the suit, unless the assignee offers to indemnify him against the costs which might be incurred by its further prosecution.

2. *When appeal lies, or mandamus.*—When a suit is properly dismissed at the instance of the plaintiff on the record, the remedy of a person injured thereby is by writ of *mandamus*, and an appeal does not lie.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

(Statement of facts by HARALSON J.)

"Thomas W. Jennings, on the 21st of September, 1891, sued out an attachment against Henry W. Pearce, a non-resident, returnable to the City Court of Montgomery. The writ, coming to the hands of the sheriff, was levied by him, by summoning H. C. Chandler, who had in his possession a lot of mules and other personal property said to be the defendant's, to answer as garnishee. The said Chandler, appearing as garnishee, answered, admitting the possession of said property so levied on, but stated in his answer, that one Hollis Pearce claimed it as belonging to him. A notice was issued, under the statute, to said Hollis Pearce, to come in and propound his claim, which he did. Meantime, and before any action on the answer of the garnishee, or the claim of the property in his hands set up by said Hollis Pearce, the plaintiff took judgment against said non-resident defendant, Henry Pearce, upon proof of publication to him, for the amount of the debt, and interest, that the attachment was sued out to recover.

"A motion was made in the court by the plaintiff, to sell the property in the hands of the garnishee, and have the proceeds held, on the ground that the property was perishable and liable to waste and destruction in being held. This motion was resisted and overruled. Finally, the plaintiff, on the 11th of August, 1892, gave to one Hal. T. Walker a power of attorney, empowering him to appear in said City Court, and dismiss said garnishment proceedings, instituted in plaintiff's name against said Chandler; and

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said Walker, on the 22d of September, appeared in court, and, producing and exhibiting his power of attorney authorizing him to do so, made a motion in said cause to dismiss said suit out of court; which motion, Messrs. Richardson & Reese, the attorneys who had brought, and theretofore conducted said suit for plaintiff, and S. G. Pruett, resisted, on the ground that plaintiff had, on the 11th of August, 1892, assigned to said Richardson & Reese an interest in said debt against the defendant in attachment, for the payment of the fees for services rendered by them to him in said cause, and also on August 9, 1892, by assignment to said Pruett for a valuable consideration of the remainder of the interest of plaintiff in said suit and garnishment process against said Chandler, after the indebtedness to said Richardson & Reese for fees had been paid. These written assignments were produced and read to the court. Upon consideration, on the 23d of September, 1890, the court granted said motion to dismiss said garnishment suit; and said Richardson & Reese and Pruett excepted to the rulings of the court, and prosecute this appeal.

RICHARDSON & REESE, for appellants, cited *Chisolm v. Newton*, 1 Ala. 371; *Ware v. Russell*, 70 Ala. 174; *Welch v. Manderville*, 1 Wheaton, * 233; *Lumpkin v. Phillips*, 9 Porter, 98; *Goodwyn v. Lloyd*, 8 Porter, 257; *Holloway v. Lowe*, 7 Porter, 988; *McCullam v. Cox*, 1 Dallas, 159; *Wheeler v. Wheeler*, 9 Cowen, 34; *Field v. Oxley*, 2 Dallas, 171; *Brown v. Foster*, 4 Ala. 285; *Vicars v. Mooney*, 6 Ala. 97; *Skinner v. Sones*, 14 Mass. 107; *Jessel v. Insurance Co.*, 3 Hill, N. Y. 88; 1 Amer. & Eng. Encyc. Law, 844, n. 3.

ARRINGTON & GRAHAM, *contra*.

HARALSON, J.—There are many assignments of error which lie beyond the dismissal of the garnishment suit against H. C. Chandler, as debtor to Henry Pearce, the defendant in attachment. These are based on rulings connected with the garnishment proceeding, and it will be unnecessary to consider them, since, according to the view we take of the case, they disappear, with the errors assigned for the dismissal of that suit.

This appeal, let it be noticed, is not prosecuted by either of the parties to the original attachment suit, nor by either party to the garnishment proceeding, but by Messrs. Richardson & Reese and S. G. Pruett, who are strangers to the record, but who claim to be the owners of plaintiff's cause of action, and to have the right to prosecute it.

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It may be stated generally, as a well settled principle, that a plaintiff has the absolute right, at common law, to discontinue his suit, before or after issue joined, and without the leave of the court.—1 Am. & Eng. Encyc. of Law, 184; Hawes on Parties to Actions, § 2. In *White v. Nance*, 16 Ala. 345, it was held, that a plaintiff in an action of ejectment, or trespass to try titles, may dismiss the suit, whenever he thinks proper. In the opinion rendered, Judge DARGAN said: "It is true, a suit at law may be carried on by one who is beneficially entitled to the money, in the name of him in whom is vested the legal title, and a court of law will protect the rights of him beneficially interested, and will not permit the plaintiff to dismiss the suit, if the party entitled to the proceeds of the recovery will indemnify him against the costs, to which he may be subjected." We adhere to what was there said, as a proper practice in such cases.

We are not informed by the record that Messrs. Richardson & Reese and Pruett offered to indemnify the plaintiff against the costs to which he might be subjected by the further prosecution of the case, and we are to presume they did not. Without such an offer, they had no right to resist the dismissal of the cause by plaintiff, on the grounds set up by them.

There remains another ground, on which the appeal in this case can not be sustained. In *Brazier v. Tarver*, 4 Ala. 569, it is said: "We think it very clear, that when a suit is once dismissed, at the instance of the plaintiff upon the record, the correctness of the proceeding can not be inquired into upon a writ of error; for this course would involve the defendant in a controversy, in which he has taken no part, and in which he has no interest. We do not doubt, that it is the duty of a court to protect the rights and interests of those who are beneficially interested in suits or *choses* in action. Such suitors can and ought to be protected, against the improper interference of the plaintiff on the record, but the only mode to correct erroneous action in this particular is *mandamus*."

The action of the court below, in dismissing said garnishment suit, so far as appears, was without error; and the cause being improperly here on appeal, is dismissed, at the costs of the appellants, as to the appeal, in this, and in the court below.

Dismissed.

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Harmon & Son v. Siler.

Action against Wife's Executor, for Goods Sold and Delivered

1. *When action lies to charge wife's statutory estate for necessary family supplies.*—Under the statutory provisions of force in 1884-86 (Code of 1876, §§ 2711-12; Sess. Acts 1880-81, p. 36), an action at law would not lie against the personal representative of the deceased wife, to charge her statutory estate with the price of articles of comfort and support of the household furnished during coverture.

2. *Error without injury in rulings on evidence.*—On appeal from judgment of non-suit, this court will not consider the correctness of rulings on evidence to which exceptions were reserved, and on account of which the non-suit was taken, when the record shows that the plaintiff can not recover in any event.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JNO. P. HUBBARD.

This action was brought by Harmon & Son, suing as partnership, against J. F. Pickett and W. D. Siler, the latter being sued as executor of the last will and testament of Mrs. D. N. Pickett, the deceased wife of said J. F. Pickett; and was commenced on the 3d September, 1889. The action was founded on accounts for goods sold and delivered by plaintiffs to said Pickett and wife during the years 1883-86, and sought a personal judgment against said Pickett; and it also sought to subject certain lands, alleged to have belonged to Mrs. Pickett's statutory estate, to the satisfaction of the debt, on the ground that the goods sold were articles for the comfort and support of the household, for which the husband would be responsible at common law. The complaint alleged that Mrs. Pickett died in January, 1887. J. F. Pickett demurred to the complaint, on what grounds the record does not show; and the demurrer being sustained, his name was struck out as a defendant by amendment. The executor then demurred to the complaint, on several grounds which were, in substance, that the action would not lie so framed; and his demurrer being overruled, he pleaded the general issue, the statute of non-claim, and the statute of limitations; on which pleas issue was joined. On the trial the plaintiffs reserved several exceptions to the rulings of the court on questions of evidence, and in consequence of these rulings took a non-suit; and these rulings on evidence are now assigned as error.

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TOMPKINS & TROY, and JOHN GAMBLE, for the appellant, argued the several assignments of error, and, on application for rehearing, cited Sess. Acts 1880-81, p. 36; *Ernst Bros. v. Hollis*, 89 Ala. 638.

GARDNER & WILEY, *contra*, also argued the assignments of error, and insisted that the action could not be maintained under the facts alleged and proved.

COLEMAN, J.—The complaint, as amended, presents a case in which it is sought to subject the statutory estate of a deceased wife to the payment of a debt contracted during coverture, for the purchase of articles of comfort and support of the household and family, and for which the husband would be liable at common law, by suit against the executor of the deceased wife alone.

The liability of the separate estate of the wife to such debts is purely statutory. The only judgment which the statute authorizes, so far as it affects the estate of the wife, must be founded on proceedings against the husband and wife jointly, or upon a judgment against the husband alone, followed by a motion against the wife. The estate of the wife can not be condemned to sale for the satisfaction of such claim, by independent, original proceedings against her alone, if living, or her estate, if she be dead.—*O'Connor v. Chamberlain*, 59 Ala. 435.

In the case of *Rodgers v. Brazeale*, 34 Ala. 512, it was declared, that an action at law does not lie against the administrator of a deceased wife, to charge her separate estate with the payment of articles of comfort and support of the household, furnished during coverture. These principles of law were fully recognized in the case of *Carter v. Wann*, 45 Ala. 346.

It is unnecessary to consider the rulings of the court in regard to the admissions of testimony, or the legal questions decided relative to the statute of non-claim, as, under the averments of the complaint, and the undisputed proof, or facts offered to be proven, plaintiff can not possibly recover in this action.

Affirmed.

[Harmon & Son v. Siler.]

(On application for rehearing.)

COLEMAN, J.—At the last term, a decision was rendered in this case, affirming the ruling of the trial court. The conclusion of this court was based upon previous decisions construing the statute, as embodied in section 2711 of the Code of 1876, which declared that the statutory separate estate of the wife was liable “for the payment of articles of comfort and support of the household and family for which the husband would be liable at common law,” &c. This court had uniformly held, under the statute, that the estate of the wife could not be subjected, by independent, original proceedings against the wife alone, if living, or her estate, if she be dead. The authorities are cited in the main opinion.

Upon the application for a re-hearing the point is made that by virtue of the amendments of section 2711 of the Code *supra*, by act approved March 1st, 1881, (Acts of 1880-81, p. 36), the personal representative of the wife may be sued in such cases alone, although the husband is living.

After declaring the liability of the separate estate of the wife, section 2711 provided for the enforcement of the right “against the husband alone, or against the husband and wife jointly.” The amendatory act, after setting out the section to this point, adds as follows: “and in the event of the death of the wife, the same may be enforced against the personal representative, and, if the husband be dead, said action may proceed against the wife alone,” &c. It is evident there is nothing in the amendment which would justify any change in the construction of the statute previously placed upon it by the decisions of this court, which held that the action must be against the husband alone, or against the husband and wife jointly. The amendment expressly provides that the wife may be sued alone, if *the husband be dead*, but there is no express provision that the wife, if living, may be sued alone, if the husband is also living. It would be a strained construction, not founded upon any reason, which would authorize the suit against the estate of the wife alone, after her death, and would not authorize it against her in life. We do not think such construction was intended by the legislature. If it was intended to make the estate of the wife liable at all events, the amendment would have provided that she might be sued alone while the husband was living. The amendment would also have extended to the following section 2712 of the Code of 1876. This section provides, that if suit be brought against the husband alone, and execution returned “not satisfied,” then the wife’s property may be

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subjected to sale by order of the court, upon motion, and ten days notice in writing given to the wife. Section 2712 is not amended. Section 2711, as it originally stood, and as amended, provides that the claim may be enforced by suit against the husband alone, or against the husband and wife jointly. If the suit be brought against the husband alone in the first instance, under the statute as amended, there is no way to enforce the judgment against the wife if living, except by virtue of section 2712, unless the operation of the amendment is extended to section 2712; for, under this section, it can not be done after the death of the wife.

Looking at all the statutes upon the subject, and construing them together, which we feel justified in doing under the terms of the amendment, we adhere to the conclusion reached in our former opinion, in holding that the statute does not authorize an original suit against the personal representative of the deceased wife alone, the husband living, to enforce contracts of this character.

The judgment-entry shows a ruling of the court upon demurrers. The demurrers are not set out, and we do not know the causes of demurrer assigned. Moreover, there is no assignment of error upon the ruling of the court in this respect.

Affirmed.

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Action by Contractor and Material-man, to enforce Statutory Lien.

1. *Notice before filing claim of lien; constitutional provision as to laws impairing remedy for enforcement of contracts.*—The provision contained in the act approved February 12, 1891, requiring ten days notice to be given by a person claiming a mechanic's or material-man's lien before filing his claim of lien (Sess. Acts 1890-91, p. 578, § 5), applies to liens claimed under contract made prior to the passage of the statute, the work not having been commenced in this case until after its passage; and this application of the statute does not make it offend the constitutional provision prohibiting laws impairing the obligation of contracts or the remedy for their enforcement.

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APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the Johnson Wall Paper Company, a private corporation, against J. A. Osborn; was commenced in a justice's court, on the 3d June, 1891, and sought to enforce a statutory lien on certain property belonging to the defendant, which was particularly described, for work done on it and materials furnished by plaintiff as an original contractor. The complaint claimed \$61.50, with interest from February 25th, 1891, as due and owing by defendant to plaintiff, for work done and materials furnished under contract between the parties made on the 1st February, 1891, for building and improvements on the lot described; and alleged that a claim for a statutory lien was duly filed in the office of the probate judge of Jefferson within two months after the indebtedness had accrued. There was no demurrer to the complaint. The defendant filed two pleas: (1) that the work was so badly done it was worthless; and (2) "that the ten days notice required by law that he looked to the property mentioned in said complaint for the payment of said work or improvements was not given to defendant, his agent or architect, nor left at his residence, and hence plaintiff has no lien on said property." The plaintiff took issue on the first plea, and demurred to the second, on the ground that "the contract, for the work for which a lien is claimed under the complaint, was made before the passage of the law requiring ten days notice, as set out and referred to in said second plea, to-wit, February 1, 1891, and said ten days notice was never required under the law in force when said contract was made." The court sustained the demurrer and the cause was tried on the issue joined on the first plea, a jury being waived by consent, and the cause submitted to the decision of the court.

On the trial, the evidence showed that the contract between the parties was made on the 1st February, 1891; that the work was to be done for \$61.50, and was to be a "a first-class job;" that the work was commenced after the 12th of February, and finished about the 17th. The plaintiff's evidence tended to show that the work was "a first-class job;" and that plaintiff complied with all the provisions of the law giving and regulating the lien of mechanics and material-men, as it existed prior to February 12th, 1891; and plaintiff read in evidence a paper written by defendant ninety days after the completion of the work, in which he promised to pay for the same. The defendant's evidence tended to show that the work was not well done—that some

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of the paper came loose from the wall within ninety days after it was put on; and he proved, also, "that plaintiffs did not give notice to him, his agent or architect, ten days before filing his lien, that plaintiff looked to his lien on said house for the payment of his said claim against defendant." This being substantially all the evidence, the court rendered judgment for the plaintiff, and declared a lien on the property as claimed. The defendant excepted to this judgment, and he here assigns it as error, together with the ruling on the demurrer to his second plea.

BULGER & HEFLIN, for appellant.—The law now of force, and which was in force when the work was done which is the basis of this action, requires ten days notice to be given before filing claim of lien; and it is admitted that this notice was not given. As applied to this case, the law is not obnoxious to constitutional objections.

WADE & VAUGHAN, *contra*, cited *Chandler v. Hanna*, 73 Ala. 393; *Plumb v. Sawyer*, 21 Conn. 351; 96 U. S. 595; 44 Wis. 652; 3 Harr. Del. 344.

HARALSON, J.—The only question presented for our review in this appeal is, whether the claim of the plaintiff for a lien must have been asserted under the mechanics' and material-men's lien law, as amended by act of February 12, 1891 (Acts of 1890-91, p. 578), or under the law of Code as it stood before the amendment. That said act was a mere amendment of the former law, and not a repeal of the old and the adoption of a new system on that subject, we have had occasion at this term to decide.—*Birmingham Building & L. Asso. v. May & Thomas Hardware Co.*, ante, p. 276, and *Colby v. St. James (Colored) M. E. Church*, ante, p. 259. If the former, and not the amended statute applies, it is conceded the plaintiff was entitled to the declaration and enforcement of a lien as awarded by the court; but, if by the latter, the ruling and judgment of the court are erroneous.

The repeal of a number of the sections of the Code, and their substitution by said amendatory act, was an enlargement of the rights of mechanics and material-men, and was designed to make a better and more perfect system of laws on that subject, and not to take away, or render less valuable, the remedies for the enforcement of such statutory liens.

The only point of controversy grows out of section 5 of the amendatory act,—the plaintiff's contention being, that a new right of duty was therein prescribed, which impaired

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his contract and lien, and was, therefore, void as to him, leaving him for the assertion of his rights under the former statute; and that of the defendant, that said section did not have any such effect, and plaintiff was bound to pursue the remedy supplied under the amended law, which he did not do, and, therefore, lost his lien.

A builder's and mechanic's lien, as has been everywhere held, is of purely statutory origin. Its character, operation and extent must be ascertained by the terms of the statute creating and defining it. While every lien of this kind has a contract as its foundation, it is created rather by the law than by the contract of the parties, is analogous to the vendor's lien for the purchase-money of land, and is based on a like reason—that it is unconscionable for a vendee to retain the vendor's property and not pay the price he agreed to pay for it. It is the work of mechanics and laborers or materials furnished by them and others, by which value is added, or supposed to be added to property, which in all good conscience the proprietor ought to pay for, which constitute the foundation of the lien under the statute.—*Copeland v. Kehoe*, 67 Ala. 597; *Chandler v. Hanna*, 73 Ala. 391; *Wadsworth v. Hodge*, 88 Ala. 503; Phillips on Mechanics' Liens, § 1.

In keeping with these principles, we have uniformly held, that in order to avail himself of this right and remedy, the lienor must comply substantially with the requisitions of the statute, in respect to filing a just and true account of the demand, properly verified, in the office of the judge of probate, within the time required. It must be perfected in the manner authorized. The jurisdiction and the remedy, being prescribed, can be exercised and pursued only in the tribunals and in the mode provided by the statute.—*Chandler v. Hanna*, *supra*; *Globe Iron R. & C. Co. v. Thatcher*, 87 Ala. 458; Phillips on Mechanics' Liens, § 21; 1 Jones Liens, § 106.

The authorities hold, also, that a statute creating a lien may be modified or repealed by statute, the only difference between them being, as to the effect such changes or repeals may have on existing contracts. In *Curry v. Landers*, 35 Ala. 280, for instance, this court said, that the constitutional power of the legislature to abrogate a lien upon real estate given by the preexisting law, by the repeal of the law, is a conceded question, and that it regarded the exercise of such a power by the legislature as affecting the remedy only, and not as impairing the obligation of the contract. To the

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same effect are *Martin v. Hewitt*, 44 Ala. 435, and *Ex parte Pollard*, 40 Ala. 88, and authorities in those cases.

These decisions were under the constitutions of this State, prior to our present constitution, which, in addition to the prohibition in former constitutions, against the right of the State to pass a law impairing the obligation of contracts, contains the provision, that, "There can be no law of this State impairing the obligation of contracts, by destroying or impairing the remedy for their enforcement." Art. III, § 56.

We have examined and collated the decisions of the Supreme Court of the United States bearing on the construction of this clause of our constitution, and our conclusions are, as drawn from those decisions, that a remedy subsisting in a State when and where a contract is made and is to be performed, is a part of the obligation, and any subsequent law of the State which so affects that remedy, as substantially to lessen the value of the contract, is forbidden by the constitution, and void; that if a particular form of proceeding is prohibited, and another is left or provided, which affords an effective and reasonable mode of enforcing the right, the obligation is not impaired; that the legislature has the control, and may enlarge, limit or alter modes or proceedings and forms to enforce a contract, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the right; that the remedies for the enforcement of obligations which exist when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided.—*Edwards v. Williamson*, 70 Ala. 145, *Edwards v. Kirksey*, 96 U. S. 600; *Tennessee v. Sneed*, 96 U. S. 74; *Kring v. Missouri*, 107 U. S. 233; *Antoni v. Greenhow*, 107 U. S. 798; *Mobile v. Watson*, 116 U. S. 305; *Seibert v. Lewis*, 122 U. S. 284; *Denny v. Bennett*, 128 U. S. 495.

The 5th section of the amendatory act of 1890-91, reads, "That any person holding claims under this statute, shall give notice to the owner or proprietor, his agent or architect ten days before filing his lien, giving the amount of his claim, and that he looks to his lien on the building, improvement article or utility, for the payment of his claim; *provided*, that, if such notice is left at the residence or place of business of the owner or proprietor, his agent or architect, it shall be deemed a full compliance with this section." This section does not impair the remedy for enforcing a lien growing out of a contract made before the enactment of

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the amendatory act, or lessen the value of the contract on which it is based, in any degree. The remedy is as perfect as before. The object of this section, was not to diminish the rights of the lienor under the law, but, without doing so, to require justice to be done to the proprietor, to save him loss and damage. With such a notice as here prescribed, the proprietor might retain from the contractor and save himself, and pay on demand or notice, without cost and litigation, and this with as complete and unimpaired remedy as the contractor enjoyed before.

The court erred in sustaining plaintiff's demurrer to the 2d plea, and in rendering judgment for plaintiff below.

Reversed and remanded.

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Action for Damages for Delayed Telegram.

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1. *General demurrers.*—When the complaint contains a substantial cause of action, this court will not consider a general demurrer to it which is forbidden by the statute, (Code. § 2690).

2. *Damages for mental anguish caused by negligent failure to transmit telegram.*—Plaintiff having sent a telegraphic message to his brother's wife in a distant town, inquiring about the condition of his mother, who was very ill, and asking for an immediate answer, and his brother replying to the message; he may recover damages for his mental anguish and distress on account of negligent delay in the transmission of the reply message, which prevented his arrival at his mother's bedside until several hours after her death.

3. *Waiver of cash payment for telegram; limitation of agent's authority.*—If the agent of the telegraph company, receiving the reply message for transmission at night, promised to wait until the next morning for payment of the charge, the company can not defend an action for damages on account of delay in its transmission, on the ground that the agent had no authority to make such promise, unless it is shown that the person sending the message had notice of his want of authority.

4. *Punitive damages.*—If the agent of the telegraph company, receiving the reply message for transmission, knew the urgent necessity for promptness in forwarding it, but delayed to send it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinces an utter disregard of the feelings and rights of the plaintiff; and if they so determine, they may award punitive damages.

5. *Damages not excessive.*—The award of \$500 as damages by the jury can not be considered excessive, when the plaintiff was prevented by the delay from reaching his mother's bedside until after her death, and the evidence shows such gross negligence as would have authorized the jury to give punitive damages.

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[Western Union Telegraph Co. v. Cunningham.]

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This action was brought by O. T. Cunningham against the appellant corporation, to recover damages for the defendant's failure to transmit to him, with proper dispatch, a telegraphic message in reply to one which he had sent, by which delay he was prevented from reaching the bedside of his dying mother before her death. The complaint averred that the defendant "negligently and carelessly failed to send and deliver said reply message until the next day after it was received," and that, "by reason of defendant's gross and willful negligence in transmitting and delivering said message to him, plaintiff was caused much painful anxiety and distress of mind, and by reason of said omission of duty was prevented from seeing his mother in her last illness before her death." The opinion states the other averments of the complainant. The defendant demurred to the complaint, (1) "because it shows on its face that plaintiff has no cause of action; and (2) "because it does not show a case in which plaintiff is entitled to recover damages for mental anguish and suffering." The court overruled the demurrer, and the cause was tried on issue joined, resulting in a verdict for plaintiff for \$500. The errors assigned are, the overruling of the demurrers to the complaint, the refusal of two charges asked by defendant, and the overruling of a motion to set aside the verdict and grant a new trial.

DENSON & TANNER, for appellant, cited *W. U. Tel. Co. v. Wilson*, 93 Ala. 32; *Wilkinson v. Searcy*, 76 Ala. 176; *R. & D. Railroad Co. v. Vance*, 93 Ala. 144; *Ensley Railway Co. v. Cheuning*, 93 Ala. 24; *A. G. S. Railroad Co. v. McAlpine*, 75 Ala. 120; *E. T. V. & Ga. R. R. Co. v. Bayliss*, 77 Ala. 436.

J. A. BILBRO, *contra*, cited Code, § 2690; *Kennon & Bro. v. W. U. Tel. Co.* 92 Ala. 399; *W. U. Tel. Co. v. Henderson*, 89 Ala. 510; *Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 695, or 6 Amer. St. 864; 1 Sutherland on Damages, 734; *Cobb v. Mahone & Collins*, 92 Ala. 630; 2 Thompson on New Trials, § 2397.

HEAD, J.—The complaint alleges that plaintiff, whose mother was at the time very ill at or near Bluff City, Tennessee, sent by the defendant telegraph company, on the evening of April 5th, 1890, from Attalla, Ala., to his sister-in-law at Bluff City, a telegraphic message, as follows: "How is ma? Answer at once;" that this message was promptly

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transmitted and delivered to plaintiff's brother at Bluff City, about an hour afterwards, who at once replied as follows: "No better this morning, but little hopes of recovery;" that this reply was given to defendant, to be forwarded immediately, which defendant promised to do, but negligently and carelessly failed to do until the next day after it was received by that plaintiff, on receiving the reply, at once went to his mother, and on reaching her bedside found she had been dead several hours. The complaint alleges that, if defendant had promptly transmitted and delivered his brother's message, he would have reached his mother several hours before her death; that by reason of the failure, &c. plaintiff suffered painful anxiety and distress of mind, &c.

The defendant interposed demurrers to this complaint, but if the complaint contains a substantial cause of action, we can not consider them, for the reason that they are generally demurrers forbidden by the statute.—Code, § 2690.

The principle is settled by our decisions, that the sender of a message, between whom and the company there is no contractual relation in reference to its transmission, can not maintain action for damages for mental anguish suffered by him by reason of a negligent failure to transmit the message. *West. Un. Tel. Co. v. Wilson*, 93 Ala. 32, and cases there cited. We are of opinion, the present complaint discloses that relation between the plaintiff and the defendant. The message which the plaintiff sent to his sister-in-law, in legal effect, if she had acted under it, constituted her his agent to obtain for him the necessary information as to the condition of his mother, and communicate the same to him, at his expense. The defendant transmitted and delivered this message, and knew its import; knew the service was to be performed by her, for the use and benefit of the plaintiff, and at his special request. The brother received the message, and undertook to perform, and did perform the service, in the place of the sister-in-law; and it is alleged the defendant received from him the reply, and agreed to send it. It was competent for the plaintiff to ratify, and he did ratify, this substitution of the brother for the sister-in-law in the performance of the service; and the defendant, knowing all the facts, and having received the reply from the brother, and agreed to send it, can not be heard to complain that the agency was not performed by the sister-in-law. We think, therefore, the complaint shows a substantial cause of action for the recovery of damages for the breach of a contract made with the plaintiff to transmit and deliver the reply message; and, in aggravation of the damage naturally resulting from that breach.

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which, in this case, is merely nominal, special damages for mental anguish, if any resulted, may be recovered.

The evidence shows that the delivery of the reply message to the agent of the defendant, if that delivery occurred according to the plaintiff's version, was not accompanied by payment of the toll, or reward; the plaintiff's testimony tending to show that the agent agreed to accept payment next morning, when it would be more convenient to make the necessary change. The agent, King, testified: "The rules of the company did not allow me to credit any body. I had no instructions to credit any body. Cash must be paid before message is sent." The evidence shows that he was the operator in charge of the defendant's office at Bluff City. It was his duty to transact generally the telegraph business of the defendant at that place. He was therefore a general agent for that purpose. There is no evidence tending to show that plaintiff, or his agent, the brother, knew of any limitation imposed by the company, upon the authority of its agent to contract for the sending of a message without prepayment of the toll.—*Louisville Coffin Co. v. Stokes*, 78 Ala. 372; 1 Am. & Eng. Encyc. Law, 350; *Wheeler v. McGuire*, 86 Ala. 398. If therefore it be true, as the plaintiff's evidence tends to show, that the agent waived the payment until the next day, and accepted the message and agreed to send it at once, the defendant can not avail itself of private instructions, not known to the plaintiff, forbidding the agent so to act.—Authorities *supra*.

Inasmuch as the plaintiff's evidence tends to establish the material allegations of the complaint, the general charge requested by the defendant was properly refused.

Charge number one requested by the defendant, raises the question, whether, as a matter of law, upon the effect of the whole evidence, the plaintiff might recover punitive damages. We are of opinion that was a question for the jury. The telegram disclosed that plaintiff's mother was very ill, with little hope of her recovery. It was in reply to plaintiff's message requesting the information at once. Plaintiff's brother testified that he said to the operator that he wanted the message to go at once, and he promised that it should. These facts suggested urgent necessity for the utmost promptness and dispatch on the part of the defendant. If, under these circumstances, as the plaintiff's evidence tends to show, the message was received by the defendant for transmission, and was detained from one day until the next, we think it was properly left to the jury to determine whether such failure was or not so grossly negligent as to evince an utter disregard of the

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feelings and rights of the plaintiff. If such was its character the jury might properly have awarded punitive damages. The charge was properly refused.

We are asked to review the ruling of the City Court refusing a motion for a new trial. The grounds of the motion insisted upon in argument are, 1st, that the verdict was contrary to the evidence; 2d, that the damages awarded were excessive.

It is very clear, under the evidence, that we can not disturb the ruling of the court on the first ground of the motion. The testimony of plaintiff's brother is positive and emphatic, that the message was delivered by him, on the night of the 5th of April, to King, the operator, in person who promised to send it at once. On the contrary, the testimony of King is positive and emphatic, that the message was not handed to him in person, but was sent to him by the hands of Davis, a man young in the office; that he refused to receive and transmit it, because not accompanied by payment of the toll, until the next morning, when plaintiff's brother called at the office and paid the toll. King's version of the transaction is corroborated by Davis. These witnesses were before the jury, who had the opportunity of observing their demeanor and determining more intelligently than we can who was most entitled to credit. Moreover, the proof is undisputed that the house of plaintiff's brother, where the message was written, and where he could at once be found, was only 150 yards from the telegraph office. Taking the defendant's evidence as presenting the true version, Davis was the man appointed by King to deliver the plaintiff's message of inquiry. Davis delivered it, and received from plaintiff's brother the reply, with the request that it be transmitted at once, and the statement that he, the sender, would call next morning and pay for it. Davis carried it to the office, and offered it to King, making known the sender's request. In view of the urgent nature of the message, and the very short distance the sender then was from the office, it was clearly King's duty to have notified the sender of his unwillingness to send the message without prepayment of the toll, so as to have given the latter an opportunity to comply with the demand. This duty he ignored, and left the sender to remain in reliance upon the belief that the message had been promptly transmitted. This was, in our judgment, of itself a waiver of the right to demand prepayment, and it was King's duty to have sent the message.

The plaintiff's actual damages in this case were alone sustained in the mental anguish he suffered by reason of not

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reaching his mother's bedside before her death. The law fixes no standard by which to measure such damages, except the application to the peculiar circumstances of the case of the sound judgment and discretion of the jury, and their just and impartial determination of what sum is fair and right to be awarded. The jury in the present case awarded five hundred dollars. In this sum they may lawfully, as we have said, have included damages by way of punishment. The amount is not so great that we can say it is manifestly unjust or oppressive, and we must, therefore, treat the verdict as not an improper exercise of the discretion of the jury.

The judgment of the City Court is affirmed.

Giddens v. Bolling.

Bill in Equity for Cancellation of Mortgage.

99	319
106	351
99	319
107	371
110	408
99	319
115	426
99	319
126	317
99	319
126	631

1. *Mortgage of homestead; acknowledgment by wife; conclusiveness of officer's certificate.*—When a mortgage, or other alienation of the homestead, is signed by husband and wife, and a certificate of acknowledgment, in due form, is appended to it by an officer authorized to take it, the certificate is conclusive as to the facts stated, unless impeached by proof of fraud or duress, in which the grantee participated, or of which he had knowledge or notice before he parted with the consideration; but, if there was in fact no appearance before the officer, or no acknowledgment whatever before him, that fact may be shown in avoidance of the certificate, and it renders that instrument void, even if the grantee is a purchaser for value without notice.

2. *Offer to do equity.*—When a mortgage is given for money borrowed, and the mortgagor afterwards seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The facts in this cause were thus stated by HARALSON, J.:

"The bill in this case was filed by the appellant against the appellee, on the 2d of January, 1890. It sets out that complainant was the owner in fee of 1436 acres of land—which is particularly described—lying and being in the county of Pike in this State; that he is, and has been for about twenty years past, a married man, the head of a family, and resides on the lands described, with his family, as their homestead, and was residing thereon at the date of the

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mortgage he executed on said lands to the defendant, hereinafter referred to; that on the 14th day of February, 1883, he executed a mortgage on said lands to the defendant, to secure an indebtedness of \$7,500, evidenced by his promissory note for that sum, bearing even date with the mortgage, and that there was included in the mortgage excessive usurious charges, which were unjust; that his wife, Mrs. Martha A. Giddens, refused to sign said mortgage, and never in fact signed the same, and never authorized any person for her and in her stead to sign it, and never acknowledged it before any officer, separate and apart from her husband, in the manner required by law to alienate her homestead. Complainant claims, as he is advised, that the mortgage has no binding force upon the realty therein described, and is absolutely void; but, if he is mistaken in that, he avers that it is void, as to his homestead of 160 acres, and the appurtenances thereon, not exceeding \$2,000 in value; and he selects and describes the particular 160 acres of land, out of the whole tract, which he claims to be exempt to him as his homestead, free from any binding force of said mortgage. He also avers that the mortgage is outstanding, has been recorded in the office of the Probate Court of Pike county, and continues to be and is a cloud on his title to said lands.

"There is no offer in the bill to repay the money he received from the defendant, nor in any manner to do equity; and there is no charge of fraud or collusion on the part of the defendant, or the officer purporting to take the acknowledgment of the mortgage, or on the part of any person. The prayer of the bill is for a decree declaring said mortgage to be void, and of no force or effect as to complainant's homestead; that an account be taken between complainant and defendant; that defendant be required to deliver up said mortgage for cancellation; that it be declared void and cancelled; that the record thereof be stamped so as to show its invalidity, and for general relief.

"There was a demurrer to the bill, because it was indefinite in its allegations as to usury, and because there was no offer to pay to complainant what defendant owes him, or that may be found to be due to him; and a motion was also made to dismiss the bill for want of equity. The chancellor overruled the demurrer, and the motion to dismiss.

"The defendant answered, admitting the making of said mortgage, and attaches a copy thereof, as a part of his answer, to which is appended in due form an acknowledgment by complainant and his wife, Martha A. Giddens, purporting

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to have been made before and certified by S. H. Burgess, a justice of the peace for Pike county, Alabama, and also a certificate in due form, by the same officer, of his examination of Mrs. Giddens, separate and apart from her husband, in the manner required by statute for the conveyance by a married woman of her homestead. Said mortgage conveyed the real estate described in the bill, and a large lot of personal property belonging to the former; and was foreclosable on the 1st January, 1886. It gave the defendant the right to purchase the property, at any sale that might be made of the property under the mortgage, and in the event of his becoming the purchaser, the person whom he might, by indorsement on the mortgage, authorize to execute title, might make conveyance to, and invest in him all the right and title of complainant.

"The defendant further states, that after having given notice by publication, in the manner and for the time required by the term of the mortgage, he proceeded on the 11th day of February, 1886, to sell the lands described in the mortgage, at public auction, at the artesian basin in the city of Montgomery, for cash, and at the sale became the purchaser of the same, and received title thereto from E. P. Morrisett, who made the conveyance under authority of the mortgage; that all the personal property in the mortgage was appraised by agreement, by disinterested parties, and defendant took it at the appraised valuation, and gave complainant credit therefor, on his mortgage debt; and after giving him credit for the amount the land brought at said sale, and the value of the personal property, and all other credits to which he was entitled, there remained due on the mortgage the sum of \$2,000.

"Defendant avers in his answer, that he never heard until the fall of the year 1888, that Mrs. Giddens claimed never to have signed said mortgage; that complainant represented to him that the mortgage had been duly executed by his wife, and defendant advanced him the money he let him have, on that representation, which he believed to be true; and he denies the allegations of the bill that said Martha A. refused to sign said mortgage, and never authorized any person for her and in her stead to sign it, and that she never acknowledged the same before any officer separate and apart from her husband.

"On final hearing, the Chancellor denied the relief sought, and dismissed the bill; and his decree is here assigned as error."

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GARDNER & WILEY, for the appellant, cited *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315; 1 Dev. Deeds, § 231-41.

E. P. MORRISSETT, *contra*, cited *Downing v. Blair*, 75 Ala. 216; *Cahall & Pond v. Mutual Building Asso.*, 61 Ala. 232; *Miller v. Marx*, 55 Ala. 339.

HARALSON, J.—There is no allegation or proof in this case that the defendant, Bolling, or any other person, practiced any fraud upon Mrs. Giddens to procure her signature and acknowledgment of the mortgage before the justice of the peace. The proof is undisputed, that the mortgage was executed and acknowledged in Pike county and delivered to the defendant in Montgomery. The defendant testifies, that he never heard of the alleged failure and refusal of Mrs. Giddens to sign or acknowledge the mortgage, until the year 1888, more than two years after it had been foreclosed; and the proof is abundant to show that the defendant took the mortgage, and parted with his money, *bona fide*, without any notice of the alleged falsity of the certificate of acknowledgment by the wife, and in full reliance upon the truth of the same.

The question which lies at the foundation of the homestead claim of Mrs. Giddens, on the ground upon which the bill places it—viz.: that she never signed or acknowledged the mortgage—has recently received careful consideration at our hands, and the principle which controls in such an issue, as we there announced, is, that when there has been no appearance before the officer, and no acknowledgment at all made, the fact may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers, and his false certificate is void; "but, when there is an appearance and acknowledgment in some manner, then the official certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee." *Grideb v. Am. Freehold L. M. Co.*, ante, p. 281; 1 Am. & Eng. Encyc. of Law, p. 160, §6.

The evidence upon the issue, whether Mrs. Giddens ever signed and acknowledged the mortgage, on the part of the complainant, is that she swears she never did either; that her husband, the complainant, and Burgess, the justice, came to her on the 14th of February, 1885, and her husband said to her he desired her to sign the mortgage, and she re-

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plied that she would not do so, whereupon her husband signed her name to the paper, and handed it to Mr. Burgess, the justice. And yet, she swears, directly afterwards, that she first learned that her name was signed to said mortgage of 1885, in the fall of 1888, when her husband showed the mortgage to her, and asked her if it was her signature, and she informed him it was not. She also testified, she never heard of the sale of the lands under mortgage, until the fall of 1888, although they had been advertised for sale, and the personal property included in the mortgage was appraised by parties who went to her house for the purpose, and remained over night. The plaintiff corroborates this statement, saying, he believed he had the right to sign her name; that he handed it to Burgess, the justice, who filled out the certificates, and asked his wife no questions; that he carried the mortgage to Troy, to be recorded, with instructions to forward to defendant at Montgomery, and it was sent to him through the mails.

Mrs. E. V. Boykin, a sister of complainant, testifies that she was present when Mr. Giddens and the justice came to the house, on the 14th of February, 1885; that Mrs. Giddens did not sign the paper, but refused, after which complainant and Burgess, each wrote on it, and both left the house; that Mr. Burgess did not say anything about the paper, and did not take Mrs. Giddens' acknowledgment to it, separate and apart from her husband. These three witnesses, complainant, his wife and sister, are the only ones who testify that the mortgage was not signed and acknowledged by Mrs. Giddens.

The proof on this point, by the defendant, may be briefly stated. Burgess, the justice, on being shown the certificates to said mortgage, swore, "that the same is true. Both of said certificates attached to said mortgage, which is attached to R. E. Bolling's testimony, marked Exhibit B to same, are true. The separate acknowledgment of Mrs. Giddens, as well as the acknowledgment with her husband, took place at her residence at Briar Hill, Ala. I saw and talked to Mrs. Giddens herself. . . . She acknowledged that she had signed said mortgage; but I did not see her sign it. I can not possibly be mistaken about her acknowledging that she signed said mortgage. I am not related to, or connected with R. E. Bolling, and have no interest in the result of the suit."

The defendant testifies, that in the fall of 1888 he proposed to complainant that, if he could raise \$7,000, he would re-convey to him the place; that the same could be raised

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by a loan on the property; and then, complainant for the first time told him that his wife objected to signing any papers for a loan, because her examination separate and apart from her husband, in the execution of the mortgage of 1885, had never been taken; that he went to Briar Hill to see Mrs. Giddens about the matter, and she informed him that she had not signed the mortgage but that her husband, at her request, signed her name for her to it; and further that Alonzo P. Smith was present and heard the interview. The witness, Alonzo P. Smith testified that he was present at that interview, and heard Mrs. Giddens say to Mr. Bolling, that she did not sign the mortgage, but had authorized or told her husband to sign her name for her.

E. P. Morrisett testified he had acted as attorney for defendant in his transaction with complainant; that at the time of the delivery of the mortgage of 1885 by complainant to defendant, they both came to his office in Montgomery, and submitted to him, as an attorney, whether or not said mortgage had been properly executed and acknowledged; that he had had a number of interviews with said Giddens about this mortgage, had foreclosed the same for defendant, bought the property in for him, drawn rent notes from complainant to defendant for the property since the sale, and heard for the first time from defendant, in the fall of 1888 and afterwards, from complainant and his wife, that she claimed never to have executed and acknowledged the mortgage. Witness further stated that he went to see Mrs. Giddens in reference to her execution of this mortgage, and in reply to his question, "If he had understood correctly that she had said that her husband had forged her name to the mortgage and taken it to defendant to raise money on?" she replied: "No; that she had said she did not sign it, but had told him he might sign her name to it, if he desired, but that she would not do it."

The evidence of the complainant is entitled to no consideration at our hands. By his conduct, if not by his words, which spoke as plainly as words could, he represented to the defendant that his wife had duly executed and acknowledged the mortgage. He got the money of the defendant, on the mortgage, by the deception he practiced; he allowed him to foreclose it, and afterwards, for several years, rented the lands from him, and executed his notes to him for the rent, and not till the Fall of 1888 did he disclose to him that there was any infirmity in his mortgage. We are forced to discredit his account of the transaction. For obvious reasons, we decline to discuss the evidence of Mrs.

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Giddens and Mrs. Boykin, where it is brought into contradiction with the evidence of the defendant and his witnesses. Upon a careful review of it all, we are forced to the conclusion, that Mrs. Giddens acknowledged the mortgage before the justice in the manner he certifies.

- This was a bill, as has been stated, to remove a cloud from title to land. The complainant made no offer to repay the money he had obtained on the mortgage from the defendant, which remained due and owing to him thereon, and submit himself, as he should have done, to the authority and jurisdiction of the court in that behalf; and for this it ought to have been dismissed, on the motion of the defendant.—*Grider v. A. F. L. M. Co., supra.*

The chancellor found against the complainant on the facts, denied the relief sought, and dismissed the bill.

We find no error in the rulings of the lower court of which the plaintiff can complain, and its decree is affirmed.

Louisville & Nashville Railroad Company v. Grant & Richardson.

99 325
102 413

Action for Damages against Railroad Company, for Injuries to Horses in Transportation.

1. *Liability of railroad company under special contract for transportation of live-stock.*—A railroad company, receiving live-stock for transportation, may by special contract limit its liability for damages to injuries arising from its own or its servants' negligence, but not to injuries resulting from their willful negligence; and if the special contract contains the latter stipulation, is nevertheless bound to exercise reasonable and proper care and foresight to avoid injury.

2. *Burden of proof as to cause or time of injuries; general charge on evidence.*—When the action is against the railroad company which, receiving the stock from the original company, delivered them at their destination, and counts on injuries resulting from the negligence of the defendant's servants, the *onus* is on the plaintiff to prove that the animals were in good condition when received by it; but, if the evidence is conflicting as to their condition at that time, the defendant is not entitled to the general affirmative charge.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN P. HUBBARD.

(Statement of facts by HARALSON, J.)

"The plaintiffs below, Grant and Richardson, sued the L. & N. Railroad Company for damages, 'for the failure of de-

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defendant to convey safely and securely, and to deliver safely and without injury, 27 horses, the property of plaintiffs, and which were received by defendant as a common carrier, to be delivered by the defendant to plaintiffs, at the city of Montgomery, in the State of Alabama, for a reward; and the further averments are, 'that the defendant failed to convey safely and securely, and to deliver safely and without injury, the same to plaintiffs, at the place aforesaid, as was the duty of defendant to have done. And plaintiff aver that said stock was shipped by plaintiffs from Oswego in the State of Kansas, to Montgomery, in the State of Alabama; that all of said stock, while in possession of defendant, as such common carrier, were injured and damaged, and became sick, sore and faint from deprivation of food, rest and water, and from long confinement, without rest, in a close car, and that when said stock reached the city of Montgomery, Ala., on the 26th day of December, 1889, they were in a bad condition;' and then the complaint proceeds to describe their condition in detail; one was thrown down in the car, and trampled on and hurt inwardly; one was strained in the stifle joint; one was injured across his back, from being thrown down and trampled upon by other animals; and that the load of stock was damaged, bruised, injured and disfigured. Then follow these further averments: 'And plaintiffs aver, that said horses, at the time they were received by defendant as aforesaid, as a common carrier, to be safely conveyed over its line of railroad, and to be delivered to plaintiffs, in the city of Montgomery, Alabama, as aforesaid, for a certain reward to the defendant in that behalf were of the value, at least, of five thousand dollars; yet, the defendant, not regarding its duty as such common carrier, did not convey such stock, or horses, to the said city of Montgomery, Alabama, as aforesaid, and did not safely and without injury deliver the same to the plaintiffs at said city of Montgomery; but, on the contrary, the said defendant, being such common carrier, as aforesaid, did by its carelessness, negligence and default in the premises, injure the said stock above particularly mentioned and described, to the damage and injury of plaintiffs, to the amount of \$3,000. The defendant took issue on the complaint, and on the trial a verdict was rendered for plaintiffs, for \$600.

"On the trial, J. D. Richardson, one of the plaintiffs, testified, that his partner, Mr. Grant, shipped the stock to witness from Oswego, Kansas, consigned to him at Montgomery, and sent him the contract, or bill of lading, which he identified and offered in evidence. Its material parts are, the

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special rates are given, upon conditions that its rules of shipment as specified in its contract of affreightment, or bill of lading, are to be accepted and complied with; and in consideration of the acceptance by the shippers of these conditions, the St. Louis & San Francisco Railway Co. agreed to transport for the party of second part (the plaintiffs) one car of horses to Nicholas Station, at the rate of — dollars per car-load, the same being a special rate, lower than the regular rates mentioned in their tariff, in consideration of which, the parties of the second part (plaintiffs) released the party of the first part (said St. Louis & San Francisco Railway Co.) from the liability of a common carrier in the transportation of said stock, and agreed that such liability should be only that of a private carrier for hire, and from any liability for any delay in shipping said stock after the delivery thereof to the agent of said railway company. The shippers accepted for transportation the car provided by the railway company, used for the shipment of stock, and assumed 'all risk of injury which the animals, or either of them, might receive, in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat, or suffocation, or other ill effects from being crowded in the car, or of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk or damage which might be sustained by reason of any delay in such transportation; . . . or loss or damage from any other cause or thing, not resulting from the willful negligence of the agent of the railway company.' The contract concludes: 'And it is further stipulated and agreed between the parties hereto, that in case the live-stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live-stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being, that the party of the first part shall not be held or deemed liable for anything beyond the line of the St. Louis & San Francisco Railway Company, except to protect the through rate of freight named herein.'

"The witness testified that Nicholas, referred to in the bill of lading, is Nicholas Junction on the Kansas City & Memphis railroad; that from Oswego to Montgomery, the time was about four and a half or five days, and the distance 700 miles; that he had no one in attendance on said stock

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on the journey; that the bill of lading which was signed by his partner, Grant, was the only contract he took, or was taken by his partner, for the shipment of this stock.

"The evidence tends to show that the car containing the stock left Oswego in the afternoon of the 21st, arrived at Birmingham at 11:45 A. M. the 25th of December, and left the same day at 3:30 P. M., arriving at Montgomery, and car placed in stock yard at that place at 11:15, and shippers notified at 12 M. of the 26th of December; and that the horses were in a damaged condition very much as described in the complaint.

"S. S. Brown, for plaintiff, testified, that he was a clerk in the office of the Kansas City, Memphis & Birmingham R. R. Co., at Birmingham, which has a connection with the St. Louis & San Francisco Railway Co., and also with the defendant company; that the stock in question arrived at Birmingham, and was delivered to the defendant company at 11:45 A. M., Dec. 25th; that the stock was free from bruises, and in good condition, and was so receipted for by the defendant company, at the time the stock was delivered to it, by the K. C., M. & B. R. R. Co. On the cross examination he testified, that the car was in the yard of the K. C. M. & B. Co; that they were not unloaded, or taken out of the cars; that he saw them first in the train, and did not go into the car; that he looked for injuries, and could have told whether there were any swollen or bruised hocks; that the car was placed on the defendant's track, and it was the custom of railroads to receipt for any freight 'in good order and condition,' and if any thing was found wrong, to notify the road from which they got it; that he could not testify that the horses were not bruised at all, but they were not scratched up, or scarred, in any way; that he looked for scars, and it was his business to do so; that he made a personal and close examination of this stock, and was positive that the stock was in good order and condition, and free from bruises, scratches and scars; that they were fed in the car, by means of a trough along the side of the car, and he looked through the cracks and through the door when opened, to feed them; and he reiterated the statement that the stock was in good condition when delivered to defendant.

"W. T. Calloway, for defendant, testified, that he was the conductor on the defendant's train that brought the car of stock to Montgomery; that his train had no rough handling, and no wreck or run off; that the road between Birmingham and Montgomery was in good condition; that

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there was no one in charge of the stock; that when he received them at Birmingham, all the stock was standing up; that one horse got down on the way, at Jemison, 44 miles from Birmingham, and had his foot in the crack of the car, about two or three feet from the bottom; that he tried to get the horse up, with the aid of a brakeman, but could not delay the train there, and went on to Clanton, 11 miles from Jemison, where he got the animal up; and he further stated that he did not know whether the stock was otherwise injured or not.

“W. T. Kerlin testified for plaintiff, on rebuttal, that he had been connected with the defendant corporation for the last fifteen years, and had been handling live stock all his life, and that a thorough examination of live stock could not be made, or he could not do so, without unloading it.”

On this evidence the defendant asked the court to give the general charge in its favor; and the refusal of this charge, to which an exception was reserved, is the only matter assigned as error.

J. M. FALKNER and CHAS. P. JONES, for appellant.

A. A. WILEY, *contra*.

HARALSON, J.—The proof shows that the St. Louis & San Francisco Railway Company, which received the carload of horses involved in this litigation, has through connection from Oswego, Kansas, to Montgomery, Alabama, connecting with the Kansas City, Memphis & Birmingham Railroad Company at Birmingham, and that road had one with the defendant's road at that point.

The plaintiff introduced and read in evidence, without objection on the part of defendant, a contract of affreightment, made by plaintiffs with the St. Louis & San Francisco Railway Company, to transport this car of stock from Oswego, Kansas, on its way to its destination—Montgomery, Alabama—to Nicholas Junction on the Kansas City & Memphis Railroad, under which contract, as both sides seem to admit by their course of proceeding, said car came from its starting point to its destination at Montgomery; and the proof shows that the defendant receipted the Kansas City, Memphis & Birmingham Railroad Company for said car at Birmingham. Under that contract, the defendant was relieved from its common law liability as a common carrier. The liability of the carrier under it is reduced to the lowest point the law allows—freedom from damages not

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arising from its own or its servants' negligence. Beyond that measure it could not go, although it vainly attempted to do so, by stipulating that it should not be liable for loss or damage which did not result from the willful negligence of its agents. It was bound, notwithstanding such a stipulation, to exercise reasonable and proper care and foresight to avoid loss and injury to the property it transported.—*South & North Ala. R. R. Co. v. Henlein*, 52 Ala. 606; *Cent. R. R. & B. Co. v. Smitha*, 85 Ala. 47; *Western Railway Co. v. Harwell*, 91 Ala. 340.

Restricted to the liabilities in this contract—limited by construction within legal bounds—the plaintiffs commenced this action, and claim under it for all that it allows. Under the complaint filed, however, it plays no part in the trial further than to prescribe the degree of negligence to which the defendant may be held. It will be observed that, as the complaint in the cause is framed, the action is not predicated upon the absolute liability of the defendant as an insurer of the safe delivery of the stock, but proceeds upon the alleged negligence of the defendant in the transportation of the horses. Negligence is the *gravamen* of the action. The averment is, "that the defendant did, by its carelessness, negligence and default in the premises, injure the said stock." Under such averments, the burden was on the plaintiffs to show that the injury occurred after the animals came into the possession of the defendant.—*Western R. R. Co. v. Harwell*, 91 Ala. 340; 11 So. Rep. 781.

The proof tended to show that the horses were received at Birmingham, and there delivered in good condition, to the defendant. If the evidence of the plaintiffs' witness W. W. Brown, is to be believed, that fact would reasonably appear in the case. Besides, the defendant receipted for them, as being in "good order and condition." If they were in good order and condition when delivered to defendant at Birmingham, and were in very bad order and condition when they arrived at Montgomery, one of two conclusions is unquestionably true—either the evidence tending to show their good condition at Birmingham is a mistake, or, else they were injured on the journey from that place to Montgomery. When the plaintiffs, assuming the burden, as they did by the terms of the complaint, made such a state of proof as we have, as to the condition in which the animals were delivered to the defendant, they made out a *prima facie* case against the defendant, on which they might have recovered, unless it, in turn, overcame that proof, and showed that the injury complained of was not done after

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but before it received the animals, and when they were in the custody of another company. To do this, it introduced as a witness the conductor who brought the car containing the stock with his train from Birmingham. He swears to a state of facts, making it not easy for one to see how damage could have occurred on the route. There is difficulty in arriving at a conclusion, how it was. The evidence is conflicting, and very strong on each side. Surely, then, it was a case for the jury, and not for the court, rendering it improper for the general charge, asked by the defendant, to have been given.

Affirmed.

99 331
112 86

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Action for Breach of Contract.

1. *Joinder of counts for work and labor done under a contract, and for damages for breach of contract.*—When a party, under a contract, has, in part, performed his contract, and is wrongfully discharged or forced to abandon the work, he may sue upon the contract to recover the price agreed to be paid, for the work already performed, and may in the same suit declare for damages sustained by the breach of the other party in forcing him to abandon the work before its completion; the damages thus declared for being the natural consequences of the breach complained of.

2. *Signing bill of exceptions.*—A statute creating a City Court, that provides that ten days after the rendition of a final judgment in said court, such judgment shall be "as completely beyond the control of the court, as if the term of the court at which said judgment was rendered, had ended at the end of said ten days," does not limit the signing of the bill of exceptions to the ten days, next after judgment rendered in the City Court. The signing of the bill of exceptions is not a taking of control of the judgment by the court. —(*Stein v. McArdle*, 25 Ala 561, overruled.)

3. *Depositions as part of a bill of exceptions.*—Depositions taken in a cause, different from documentary evidence used on the trial, are sufficiently identified, when referred to in the bill of exceptions by the names of the witnesses; and, when being so referred to, are transcribed in the bill of exceptions, they will be considered as parts thereof.

4. *Secondary evidence.*—When, on a trial, one of the parties fails to produce certain writings, after having been notified to do so, and it is shown that the originals thereof are out of the State, copies may be introduced.

5. *Written estimates of civil engineers; when inadmissible evidence.*—In an action by contractors for an alleged breach, in preventing the

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completion of their contract, written estimates made by civil engineers, after work under the contract had been begun, can not be offered in evidence upon the inquiry of the profits the plaintiffs would have realized, if they had been permitted to perform their contract.

6. *Charges to the jury; obstruction of navigable streams.*—In an action for the breach of a contract, by which the contractors are required to remove a large quantity of solid rock lying on the bank of a navigable stream, it is shown that to blast this rock into the stream would be less expensive than to remove it elsewhere, but that such blasting into the stream might obstruct navigation, a charge that "under the law and Constitution of the State of Alabama, no one has the right to obstruct a navigable stream in the State of Alabama," is not abstract, nor is it objectionable as assuming that the blasting into the stream would necessarily obstruct navigation.

7. *Same.*—A charge to the jury, that the plaintiffs in such case, in carrying out their contract, had no right to blast the rock into the river in such quantities as would obstruct the river and endanger navigation therein, is not erroneous, and should be given.

8. *Same.*—Charges that the plaintiffs could not recover any profit for rock which they had intended to blast into the river, if any, and that plaintiffs had no right to blast rock into the river, are properly refused, as assuming that to blast the rock into the river would obstruct navigation.

9. *Measure of damages; profits under a contract.*—When in an action for the breach of a contract, by the defendant preventing the plaintiff from completing the work commenced thereunder, it is shown that they had been permitted to complete the said work the plaintiff would have realized a profit, the measure of damages recoverable is that sum which is shown would have been realized as profits, if they had been permitted to complete their contract.

10. *Same; charge to jury.*—An instruction that profits which would reasonably have been realized but for the defendant's default, and are recoverable, but not those which were speculative, contingent, probable or remote, is erroneous, in making an improper use of the word "probable;" since reasonably probable profits might be recoverable.

11. *Same.*—A charge to the jury forbidding the recovery of profits, "Unless the jury believe from the evidence that the profits claimed are certain," is erroneous; reasonable certainty being sufficient to justify a recovery.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This action was brought by the appellees against the appellants; and sought to recover damages for the alleged breach of a contract.

The contract which is the basis of the action is as follows: "Articles of agreement made this 25th day of May in the year 1888 between C. E. Danforth of New York City and R. T. Armstrong of Rome, Ga., under the firm name and title of Danforth & Armstrong, party of the first part, and the Tennessee & Coosa Railroad Company, a corporation organized under the laws of the State of Alabama, party of the second part, witnesseth: That for and in consideration of the payments hereinafter mentioned to be made by the party of the second part, the said party of the first part

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doth hereby covenant and agree to construct and finish in a substantial and workmanlike manner, to the acceptance of the Chief Engineer of the party of the second part, and subject to all of the provisions of the specifications hereto annexed and endorsed 'The Tennessee & Coosa Railroad,' the work on that part of the said Tennessee & Coosa Railroad extending from Littleton, in Etowah Co., Alabama, to Huntsville, in Madison Co., Alabama, which work is contained in two general divisions known as Division A and Division B. Division A. being understood to extend from Littleton to a point on the old grade of the Tennessee & Coosa Railroad near Guntersville, where the line of the extension of said road to Huntsville leaves the old grade as now constructed. And Division B, being understood to extend from said point on the old grade near Guntersville to a junction with the tracks of the Memphis and Charleston R. R., in Huntsville as the same may be located by the Chief Engineer, and approved by the said Tennessee & Coosa Railroad Company. It is hereby mutually agreed and understood that the work to be done on Division A. shall consist of making all excavations of rock and earth required in the unfinished cuttings from section one to section four, inclusive, and from section twenty-one to section twenty-four, inclusive, and of all the masonry, timber work, drain pipe, culverts, on the whole of Division A, and does not include the clearing and trimming, repairing or finishing of the old cuttings and embankments. It is also hereby mutually agreed and understood that the work to be done on Division B. shall consist of constructing and performing all the work required to be done for completing the substructure ready for the track, except the work connected with the Tennessee River Bridge, and excepting the iron work where iron bridges shall take the place of wooden bridges. Wherever the word contractor is used in this agreement it refers to and indicates the party of the first part. Wherever the word Company is used, the party of the second part is designated. The contractor hereby agrees to complete the work contracted to be done on Division A, on sections one to four, inclusive, by September 1st, 1888, and on the whole of said Division A by November 1st, 1888, and on Division B, from its point of beginning with the old grade on Division A. to the Tennessee River at Guntersville, by December 1st, 1888, and from Aldrick Creek crossing to a junction with the Memphis & Charleston R. R. tracks in Huntsville by September 1st, 1888, and the whole of Division B, by December 31st, 1888. The work

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shall be commenced within ten days after the contractor shall have been notified by the Chief Engineer that the same has been staked out and is ready, and shall progress in such parts of the work and at such times as the said Engineer may direct. The party of the first part agrees to perform the work specified according to the prices named within the following schedules, and in full compliance with all requirements of the contract and specifications.

SCHEDULE OF PRICES ON DIVISION A.

Earth Excavations.....	per cubic yard....	\$ 0 1
Loose Rock Excavations.....	per cubic yard....	0 3
Solid Rock Excavations.....	per cubic yard....	0 6
First-class Masonry.....	per cubic yard....	9 0
Second-class Masonry.....	per cubic yard....	8 0
First-class Arch Masonry.....	per cubic yard....	11 0
Second-class Arch Masonry.....	per cubic yard....	9 0
Box Culvert Masonry.....	per cubic yard....	3 0
Coping Masonry.....	per cubic yard....	15 0
Slope wall Masonry.....	per cubic yard....	2 0
Rip Rap Masonry.....	per cubic yard....	1 5
Concrete Masonry.....	per cubic yard....	2 5
Drain Pipe 15 inch per lin. foot.....		2 0
Drain Pipe 18 inch per lin. foot.....		2 4
Drain Pipe 24 inch per lin. foot.....		2 7
Piles per lin. foot.....		0 3
Timber in foundations per 1000 B. M.....		20 0
Timber in wooden trestles per 1000 B. M.....		25 5
Timber in wooden girders per 1000 B. M.....		21 0
Wrought Iron per pound.....		0 0
Cast Iron per pound.....		0 0

SCHEDULE OF PRICES ON DIVISION B.

Earth Excavations.....	per cubic yard....	\$ 0 1
Loose Rock Excavations.....	per cubic yard....	0 3
Solid Rock Excavations.....	per cubic yard....	0 7
First-class Masonry.....	per cubic yard....	9 0
Second-class Masonry.....	per cubic yard....	8 0
First-class Arch Masonry.....	per cubic yard....	11 0
Second-class Arch Masonry.....	per cubic yard....	9 0
Box Culvert Masonry.....	per cubic yard....	3 0
Coping Masonry.....	per cubic yard....	15 0
Slope wall Masonry.....	per cubic yard....	2 0
Rip Rap Masonry.....	per cubic yard....	1 5
Concrete Masonry.....	per cubic yard....	2 5

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Drain Pipe 15 inch per lin. foot.	2 00
Drain Pipe 18 inch per lin. foot.	2 40
Drain Pipe 24 inch per lin. foot.	2 75
Piles per lin. foot.	0 30
Timber in foundations per 1000 B. M.	20 00
Timber in wooden trestles per 1000 B. M.	27 75
Timber in wooden girders per 1000 B. M.	21 00
Wrought Iron per pound.	0 05
Cast Iron per pound.	0 04

In consideration of a faithful performance of the conditions of this agreement by the party of the first part the party of the second part hereby agrees to transport all men, materials, machinery and supplies, required by the contractor in the performance of his work, free over the tracks of the Tennessee & Coosa Railroad, and to pay on or about the tenth of each month for ninety per cent. of the work, estimated by the engineer to have been done in the previous month at the rates named in the foregoing schedule, the remaining ten per cent. to be retained by the Company till the completion of the work.

[Signed.]

"THE TENNESSEE & COOSA R. R. Co.

By E. A. QUINTARD, Prest.

DANFORTH & ARMSTRONG."

As is stated in the opinion, the pleadings and the rulings thereon are sufficiently shown in the report of the case when it was here on a former appeal. 93 Ala. 614. Such rulings of the court upon the evidence as are passed on in the opinion are sufficiently stated therein.

Among the charges given at the request of the plaintiffs, and to the giving of each of which the defendant separately excepted, are the following: (2. "The court charges the jury that if they believe from the evidence that the estimates made by W. H. Case, the Engineer of defendant on preliminary survey as to the character of the contents, whether more or less of earth, loose or solid rock; still if the jury further believe from the evidence that any portion of the line of the defendant's road has since been completed or partially completed and that said line so completed or partially completed was substantially on the preliminary line, then the jury can look to any evidence before them showing how much earth, loose and solid rock were moved in such completion, if there be such evidence before them, to determine how much of each kind, whether in earth, loose or solid rock, there were in said preliminary estimates." (3.) "The court charges the jury that they can find a ver-

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dict for the plaintiffs for damages or profits, if the preponderance of the evidence be on the side of the plaintiffs, such evidence reasonably satisfies the minds of the jury such damage or profits, although upon all the evidence there may be some uncertainty as to the amount of such damage or profits."

The defendant requested the court to give the following written charges to the jury, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe from the evidence in this case that Danforth & Armstrong have failed to give such data or standard by reference to which the profits claimed of the defendant can satisfactorily established or ascertained, then such profits would not be allowed, and your verdict on the matter profits claimed would be for the defendant." (3.) "The court charges the jury that if the profits claimed by Danforth & Armstrong of the defendant by reason of the breach of defendant's contract are probable, uncertain, speculative and such as might be conjectured would be the probable result, if Danforth & Armstrong had complied with their contract, then the plaintiffs can not recover such profits." (4.) "The plaintiffs must establish the amount of their loss from the evidence from which the jury will be able to estimate the extent of their injury, excluding all such elements of injury as are incapable of being ascertained to a reasonable degree of certainty by the usual scales of evidence, and if the evidence fails to do this, then your verdict must be for the defendant on the matter of the profits claimed by plaintiffs." (7.) "The court charges you that it is a well established rule of law that damages to be recovered for a breach of contract must be shown with certainty and not left to speculation or conjecture. Profits which would have been realized but for defendant's default are recoverable, those which are speculative, contingent, probable and remote are not recoverable. If the jury believe from all the evidence that the profits claimed by the plaintiffs are based upon probabilities are uncertain and a matter of speculation, then such profits are not recoverable, and your verdict should be for the defendant." (12.) "Profits which would certainly have been realized but for the defendant's default are recoverable, those which are speculative, contingent, probable or remote are not recoverable." (15.) "If the jury believe from the evidence that Danforth & Armstrong, in carrying out the contract with the defendant, intended or proposed to blast rock from Deposit bluff on the bank of the Tennessee River into the river, then the court charges you that Danforth

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Armstrong could not recover any profits for the quantity of rock that the jury believe from the evidence would have been blasted into the river." (16.) "If the jury believe from all the evidence in this case that the profits in this case constituted an element of the contract, then said profits can not be recovered unless the jury can estimate such with reasonable certainty. Such certainty as satisfies the mind of a prudent and impartial juror. If the jury believe from the evidence that the profits claimed are contingent, speculative and probable then they are not recoverable and your verdict should be for the defendant as to profits." (19.) "The court charges you that the law is that Danforth & Armstrong had no right in carrying out their contract to blast rock from Deposit bluff on the North side of the Tennessee River, in such quantities as would obstruct the river and endanger the navigation of the river." (22.) "The court charges the jury in this case that the plaintiffs had no right under the law to throw the rock or other material into the Tennessee River."

There was judgment for the plaintiffs, assessing their damages at \$39,990. The defendant brings this appeal, and assigns as error the various rulings of the trial court.

R. C. BRICKELL, W. H. DENSON, WILLIAM RICHARDSON and THOS. H. WATTS, for appellant.—The signing of the bill of exceptions by the judge does not affect or modify the validity of the judgment rendered, and is the exercise of no control over the judgment. The provision of the special act (Acts 1890-91, p. 1092), does not refer to the signing of the bill of exceptions.—*Strader v. Alexander*, 9 Porter, 441; *Pool v. C. & M. R. Co.* 5 Ala. 237. Speculative and conjectural damages are not recoverable.—*U. S. v. Behan*, 110 U. S. 344; *Clements v. Beatty*, 87 Ala. 238; *Refining Co. v. Barton*, 77 Ala. 148; *Young v. Cureton*, 87 Ala. 727; *Anson on Contracts* (2d Ed., Am.), p. 410, note; 3 Brick. Dig., p. 293, § 8. The recovery in a case like the present one, must be limited to profits proved, exclusive of profits remote, conjectural, or dependent on contingencies, too uncertain to base a contract upon.—*Beck v. West*, 87 Ala. 213; 91 Ala. 312; *Union R. Co. v. Barton*, 77 Ala. 148; *Brigham & Co. v. Carlisle*, 78 Ala. 248; *Harper v. Weeks*, 89 Ala. 577; *Keeble v. Keeble*, 85 Ala. 552; *Clements v. Beatty*, 87 Ala. 238; *Snodgrass v. Reynolds*, 79 Ala. 452; *McPherson v. Robertson*, 82 Ala. 459; *Daughtery v. W. U. T. Co.*, 75 Ala., 168; *W. U. T. Co. v. Way*, 83 Ala. 542; *Bell v. Reynolds*, 78 Ala. 514; *Pollock v. Gantt*, 69 Ala. 373; *Burton v. Holley*, 29 Ala. 318;

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Higgins v. Mangfield, 62 Ala. 267; *Street v. Sinclair*, 71 Ala. 110; 1 Sedgwick on Damages, 134-6 and note.

J. M. CHILTON, *contra*.—The bill of exceptions was not signed within the time allowed by law. Acts 1890-91, 1092. The first charge requested by the defendants invaded the province of the jury and was properly refused.—*Pott v. State*, 92 Ala. 37; *Jackson v. Robinson*, 93 Ala. 157; *A. C. S. R. R. Co. v. Hill*, 93 Ala. 516; 3 Brick. Dig. p. 113, §§ 10, 110. Profits that were reasonably probable could be recovered.—1 Sedgwick on Damages, 208; *Hammond v. Busse*, 20 Q. B. D. 79. Charges in reference to the blasting of a rock into the river were properly refused.—*Yarbrough Avant*, 66 Ala. 527; *Ware v. Curry*, 57 Ala. 274; *Johnson Smith*, 70 Ala. 108.

STONE, C. J.—This is the second appeal in this case. 93 Ala. 614.

The Tennessee & Coosa Rivers Railroad Company was a corporation extending from Gadsden on the Coosa river by or near Guntersville on the Tennessee river, to Huntsville. Part of the grading and other work preparatory for the superstructure had been done, but a very large part of the work remained to be done. On May 25th, 1888, *Danforth & Armstrong*, contractors, entered into a written contract with the corporate authorities of said railroad company to "construct and finish their said railroad," with certain specified exceptions. A copy of the contract is set out in the statement of facts accompanying this report of the case. It will be seen that the work undertaken by the contractors was of considerable magnitude. The contract specifies the scale of prices to be paid for each description of class of work to be done, and of the materials to be furnished, and declares the time within which the work on each of the sections was to be completed. Payments were to be made to the contractors, about the 10th of each month, of ninety *per cent.* of the value of the work done and materials furnished during the preceding month. The estimates for these several payments were to be furnished, and were furnished, by the engineers of the defendant corporation.

Except on a single question, there is very little conflict in the testimony shown in the record. That excepted question presents the inquiry, whether, if plaintiffs had completed, or been permitted to complete their contract, they would have realized a profit, and the extent of it. We say

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this was the chief question of contest, for we are not informed by the record that the railroad corporation denied the making of the contract as set out, denied that the work was done in the months of June and July, as set forth in the estimates, or denied its default in making payment according to the estimates. As candidly stated by one of the counsel for appellants, "It is apparent the principal contention in the court below was as to the damages the plaintiffs were entitled to recover." And we may add, the brunt of this contention centered in the inquiry of profits the contract enabled plaintiffs to realize, if the contract had been completed.

The pleadings in this case, and the rulings upon them, are the same as were shown on the former appeal. 93 Ala. 614. That report shows a sufficiently full account of the pleadings and proceedings up to the formation of the issue for the jury. It states erroneously that the defendant demurred to the *ninth* count. The record shows it was the eighth. The grounds assigned were that that count was in case, whereas the action was *assumpsit*. There was also a demurrer to the whole complaint, for the misjoinder of counts. The trial court overruled the demurrer on all the grounds, and held the complaint good.

If count number eight stood alone as a cause of action, and on its own specific averments, without other aid, it may be a grave question whether it presents a grievance for which *assumpsit* would lie. It may be that case would be the proper action, if any could be maintained.—*Mobile Life Ins. Co. v. Randall*, 74 Ala. 170; *Williams v. Stillwell*, 88 Ala. 332; *White v. Levy*, 91 Ala. 175; *Cap. City Water Co. v. City of Montgomery*, 92 Ala. 866. But that count does not stand alone on its specific averments. It adopts a large part of count No. 6, which sets forth a copy of the contract. It employs this language: Plaintiffs and defendant "had entered into a contract and performed work and labor, and furnished material as set forth in count No. 6 of this complaint, and the defendant had made the defaults therein stated." It is common knowledge, that to perform and execute the contract set out in count No. 6 would require a large force of hands and teams, and large expense in their subsistence; and to have them suddenly thrown out of employment would necessarily entail expense. One of the breaches set forth in count No. 6 is as follows: "The plaintiffs further allege that about the 20th of August, 1888, defendant further breached said contract in ordering the plaintiffs to cease their work on said road, and under said

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contract; and plaintiffs did then and there cease their work and have performed nothing since." We may add that count No. 6 is an elaborate special count, and sets forth that plaintiffs had done under the contract, all the breach charged to have been committed by the defendant, and claims additional damages for being hindered and prevented in carrying out their contract. Considered in connection with the sixth count, and taking into the account the natural and necessary connection between the breaches charged and the injury complained of, and bearing in mind also the nature of the service undertaken to be performed, we hold that the damages claimed in this count are so much a consequence of the breach charged, that they can be recovered in an action of assumpsit. In thus holding, we only follow what was said when the case was formerly before us.—*Ala. 614; Culver v. Hill*, 68 Ala. 66; *Pollock v. Gantt*, 69 Ala. 373; *Vandegrift v. Abbott*, 75 Ala. 487; *Brigham v. Carlisle*, 78 Ala. 243; *Horton v. Miller*, 84 Ala. 537.

A motion is made to suppress the bill of exceptions, on the alleged ground that it was not signed in time. The judgment was rendered September 12, 1891, and the bill of exceptions was signed November 30, 1891. That session of the court was opened July 6, 1891, and continued in session until thirty days before the next term. The next term commenced its session January 4, 1892, and thirty days before that time would be December 5th, 1891—five days after the bill in this case was signed. See act creating City Court at Gadsden, Sess. Acts, 1890-91, p. 1092, § 5.

It is contended, however, that under section 27 of the act, p. 1102, the session of the court must be regarded as closed at the end of ten days after the judgment was rendered, and that consequently a bill of exceptions can not be sealed after that time, without a legal order of the court extending the time. *Stein v. McArdle*, 25 Ala. 561, is relied on in support of this contention.

In *Johnson v. Washburn*, 98 Ala. 258, we considered this question in connection with *Stein v. McArdle*, *supra*, and refused to be governed by that authority, or to follow it. We adhere to what we there said, and overrule the motion to suppress the bill of exceptions.

Depositions taken in a cause, and filed in court, stand on a very different footing from documentary evidence, or other private writings used on the trial. They belong to the file, and are in the custody of the clerk, and it would seem to be nearly impossible for him to mistake their identity. It would appear to be as unlikely that the clerk would commit a mistake

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take in the matter of a deposition taken and used in the cause, as that he would miscopy the pleadings. If it were a chancery suit, no evidence of identity would be required other than the register's entry on the note of the testimony, that the deposition of —, naming the witness, was offered in evidence for complainant or defendant, as the case might be. They are not of the class of writings which were the subject of adjudication in *Parsons v. Woodward*, 73 Ala. 348; *Pearce v. Clements*, *Id.* 256; *Moore v. Helms*, 77 Ala. 379; *Stapp v. Wilkinson*, 80 Ala. 47. We will treat the depositions as parts of the bill of exceptions, because we consider them sufficiently identified.

Very many questions were reserved during the introduction of the testimony, and to charges given and refused. We do not propose to notice in detail all the questions raised. We will endeavor to state principles which are decisive of every point reserved, so far as we consider there is any merit in them.

Plaintiffs were allowed to produce in evidence certain estimates proven to have been made by the engineers in the service of defendant. Some of these were estimates of work done and performed under the contract. Others were estimates of work which plaintiffs would be required to do and perform under their contract, if fully complied with. As we understand the language of the record, this latter class consisted of the engineers' estimates made prior to the letting of the contract, and made as part and parcel of the controlling factors in determining the location of the line of the road. It was objected to the testimony last mentioned, that it was left in doubt whether the testimony offered was the original, or merely a copy. In reply to this objection it was shown, first, that defendant had been notified to produce the originals, and, second, that said originals were out of the State. The City Court did not err in the rulings on this question.—1 Greenl. Ev., § 560; 3 Brick. Dig. 440, § 510.

Testimony of witnesses for defendant was offered, for the purpose, it would seem, of disproving the amount of profits plaintiffs would have realized, if they had performed, or been permitted to perform, all the stipulations of their contract. This testimony consisted, in part, of estimates made by civil engineers experienced in railroad construction. Their estimates were offered in evidence by defendant, and were excluded, on motion of plaintiffs. There was an exception reserved to this ruling.

The question raised by this ruling is entirely different from that last above considered. The estimates then under

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consideration were those made in locating and finally establishing the line of the railroad. They were the act of the defendant itself, done in its service, as aids in the selection of the best, most practicable, and least expensive route, on which to locate and construct the road. They were manifestly a material factor, alike in letting and undertaking the construction of the road. They were specifications, made by the defendant, of the quality and probable quantity of the work and labor they were contracting to have done, and, no doubt, they entered largely into the terms of the contract agreed on. They were the defendant's description, as near as was then practicable, of the subject of the contract and its dimensions. The testimony offered by defendant had none of these qualities. It did not, and could not, enter into the making of the contract. It was *ex post facto*. It was, at most, a foundation for the differing opinion and judgment of experts, bearing on the inquiry of profits plaintiffs could have realized from a completion of their contract. It was simply reducing their oral testimony to writing, and having it placed in the hands of the jury, to aid them in understanding and utilizing it in making up their verdict. Now, while it is clearly the privilege of the jury, or any member of it, to take notes of the oral testimony as aids to memory, there is no provision of the law which authorizes the witness's memoranda of calculations, made to assist his own memory, to be placed before the jury, if objected to. It does not fall within any recognized rule on the subject. *Achlen v. Hickman*, 63 Ala. 494; *Jacques v. Horton*, 76 Ala. 238; *Stoudenmire v. Harper*, 81 Ala. 242; *Hancock v. Kelly*, *Ib.* 368; *Hurt v. Kendall*, 82 Ala. 144; *Billingslea v. State*, 85 Ala. 323.

The contract which Danforth & Armstrong entered into with the railroad company required them to move a large quantity of solid rock on the margin of the Tennessee river. The testimony shows that this rock constitutes an abrupt or perpendicular bluff of considerable height, extending quite up to the water's edge, and that the survey and location of the railway, contracted to be built by Danforth & Armstrong, required that the roadway should be excavated through that rock for a considerable distance. The testimony shows, without conflict, that this service would require that the rock should be blasted, and that to blast it into the river would be greatly less expensive than to remove it to a distance. The estimates and testimony tended to show that the quantity of rock necessary to be gotten out of the way to construct the road-bed at this point would equal one

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hundred thousand cubic yards, or more. In estimating the profits Danforth & Armstrong could have realized from the completion of their contract, some of the calculations were based on the postulate that this 100,000 yards of solid rock could and would be blasted into the Tennessee river, and that the contractors would, in that way, be relieved of the burden and expense of removing it farther. There was testimony tending to show that casting this rock, in the quantity proposed, into the river at that point, would tend to produce an obstruction to navigation. The Tennessee river is a navigable water-course. Under our Constitution—Declaration of Rights, § 25—it is declared, "That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States." See, also, Code of 1886, § 1459. In section 4136 it is declared, that "any person obstructing a navigable water-course in this State must, on conviction, be fined not less than fifty dollars."

There were three charges asked by defendant, bearing on this question, and they were severally refused. Charge 13 is in the following language: "Under the law and constitution of the State of Alabama, no one has the right to obstruct a navigable stream in the State of Alabama." There was, as we have said, testimony tending to show that the quantity of rock necessary to be removed in preparing the road-bed at the point under discussion, if cast into the river, might obstruct navigation. The charge requested was, therefore, not abstract. Neither was it objectionable on the score that it assumed, as a fact, that blasting the rock into the river would necessarily obstruct navigation. It left that question to the jury.

It is manifest, alike from the testimony and from common knowledge, that to remove the rock entirely away would entail greater expense than to blast it into the river. It might safely be said that the expense of removal would be much greater. This, if found necessary, would inevitably reduce the profits Danforth & Armstrong could have made by the completion of their contract. We hold that charges 13 and 19 asked by defendant ought to have been given, because they presented an element which properly entered into the inquiry of profits the plaintiffs could have realized from the full performance of their contract. And it would not vary this question, even if the chief engineer instructed the contractors that they could blast the rock into the river. This, because, first all men are bound to know the law; and, in the second place, it does not appear that the engineer was authorized to make such declaration and thereby bind the corporation.

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Charges 15 and 22, as asked, were properly refused. They assume, as matter of law, that to blast the rock into the river would obstruct navigation. That was an inquiry of fact which should have been submitted to the jury.

In actions for the recovery of damages, which it is alleged would have been realized by plaintiff but for the tort or breach of contract on the part of the defendant, no absolute, unbending rule can be laid down which will be applicable to every class of cases. Respect must be had to the violated duty, or breach of contract-obligation, which is the subject of complaint in the particular action. In *George v. C. & M. R. R. Co.*, 8 Ala. 234, it was said: "It is perhaps impossible to ascertain any one rule that will cover all classes of contracts, in regard to the damages that may be awarded to the injured party." So, in a class of actions brought to recover for a breach of contract, or stipulation in a contract, "the measure of recovery is the actual injury caused by the breach."—*Culver v. Hill*, 68 Ala. 66. That would seem to be the proper measure in this case. But many difficulties will present themselves in the application of this principle, and in the introduction of testimony in proof of such injury. "Among the general rules for the recovery of damages are the following: that they must be the natural and proximate consequence of the wrong done—not the remote, or accidental result. And special damages can be recovered only when they are not too remote, and are specially counted on and claimed in the complaint. What are termed speculative damages—that is, possible, or even probable profits, that, it is claimed, could have been realized but for the tortious act, or breach of contract charged against defendant—are too remote, and can not be recovered."—*Pollock v. Gantt*, 69 Ala. 373.

In passing on the case last cited, the nature of the wrong there complained of must be kept in view. It was charged in that case that, in consequence of an attachment wrongfully sued out and levied on a stock of merchandise, the business of the store was broken up, and the plaintiff thereby prevented from realizing profits from the continued business, which he could have realized if permitted to pursue his line of trade. Such possible, or even probable profits, we held, were too speculative and remote to be a basis of recovery in an action for damages. *Possible*, is that which may happen, or come to pass, while the preponderance of chances may be against its happening. We say of an event that it is *probable*, when the chances of its happening preponderate. Each of these categories, when predicated of a mercantile adventure,

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and its prospective success, must, in the nature of things, be simply conjectural, or speculative. Such mere speculation or conjecture is too unsubstantial, too uncertain, to become a basis of judicial determination.

The case we have in hand rests on different principles. The *gravamen* of this feature of the present suit is, that plaintiffs were prevented from completing their contract by the wrongful act of the defendant, and that if they had been permitted to carry it out, they would have realized the profits claimed. Of course, the success or failure of this contention, this demand, must depend on the inquiry, whether the materials could have been furnished and the work done for less money than the prices specified in the contract. Any testimony of facts bearing directly on this pivotal inquiry would be competent testimony; and if, on a due consideration of all the evidence, the jury were reasonably convinced that plaintiffs would have realized a profit, then, to the extent they were so convinced, their verdict should have been for the plaintiffs, provided they had made good their charge that defendant had broken its contract. But the measure of recovery would be and was a different inquiry. Its extent would not necessarily be any particular sum. It would be that sum—no more—which the testimony reasonably satisfied the jury they would have realized as profits by completing the contract. And if the testimony reasonably satisfied the jury that some profits would have been realized, then, to the extent they were so satisfied, but no further, they should have allowed the plaintiffs damages on this feature of their complaint.

Of charges asked by defendant and refused, those numbered 3, 7, 12 and 16 were faulty, in that they sought to make an improper use of the word *probable*. Probability is enough to found a verdict on in a case like this, if it be supported by sufficient testimony to reasonably convince, and does reasonably satisfy the minds of the jury of the truth of the proposition contended for. *Mere* probability, by itself, is not sufficient. These charges were calculated to mislead, and were rightly refused for that reason, if for no other.

Several of the charges asked were correct in their main features, but, taken in their entirety, they were misleading. Charge 14 is in the following language: "The plaintiffs in this case can not recover profits for having been prevented from fulfilling their contract, unless the jury believe from the evidence that the profits claimed are certain, both in their nature and in respect to the cause from which they proceed." This charge is subject to criticism. The word

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certain has many shades of meaning in the law. Reasonable certainty is sufficient to found a verdict on in a civil suit. This charge was liable to mislead in another respect. Some of the counts claim very large damages—one hundred thousand dollars, or more. Under the rules we have declared, if the defendant violated its contract, and thereby prevented plaintiffs from realizing profits by its completion, the latter can recover all, or any part of the sum claimed, provided their proof reasonably satisfied the jury of the fact of such lost profits, and the amount of profits so lost. Not necessary to prove that their loss equalled the amount claimed. These remarks apply equally to charges 1 and 2 asked by defendants. Their tendency was to mislead.

A few words in reference to the charges given at the instance of plaintiffs. Charge 2 is probably miscopied, and we confess we do not understand it. It appears to be somewhat involved in some of its hypotheses. The record affirms that it contains substantially all the evidence, and we find no testimony in support of some of its postulates. We will not comment further on it, lest we do injustice. We decide nothing in regard to it.

Charge 3 is somewhat involved, and may need explanation. What we have said above in reference to the measure of proof, and the extent of the right of recovery will enable the court to lay this principle properly before the jury on another trial.

Reversed and remanded.

99	346
106	631
99	346
111	300
111	452
99	346
131	84

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Action to recover Damages for Personal Injuries.

1. *Evidence; irrelevant testimony.*—In an action by a brakeman against a railroad company to recover damages for personal injuries alleged to have been caused by the negligence of the engineer, backing his train with too much force, while the plaintiff was uncoupling cars in the discharge of his duties, testimony that there were no brakemen on the train at the time of the accident, and that there had been other brakemen on the train, and they had applied the brakes, the accident could have been averted, is irrelevant, and its admission is error.

2. *Duty of engineer after discovering perilous position of plaintiff.*—In an action by a brakeman against a railroad company for personal injuries, alleged to have been caused by the negligence of the engineer,

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neer, if the evidence shows that both plaintiff and engineer were guilty of negligence, proximately contributing to the accident, there should be a verdict for the defendant, unless it is further shown that the engineer knew, or had reason to believe, that the plaintiff was exposed to the peril from which the injury resulted, and that he failed, after he had such knowledge or reason to believe such fact, to exercise that care and diligence which a man of ordinary prudence would have exercised under like circumstances to have prevented the accident, notwithstanding plaintiff's own want of care.

3. *Duty of brakeman in uncoupling cars; engineer's right to assume its observance.*—If, in the discharge of his duties, it is necessary for a brakeman to go between the cars to uncouple them, it is likewise his duty to keep his person from the point of contact between the dead-woods, and this latter being a duty which is feasible while uncoupling the cars, the engineer has a right to assume that it will be performed, and of consequence that it would not endanger the brakeman to back a train while standing on a grade, so as to give "the slack" needed to uncouple the cars.

4. *Same.*—Where there is evidence that after the cars were uncoupled, and while plaintiff was laying the coupling pin on the draw-head of the car in front, such car overtook the detached cars, and the plaintiff's arm was caught between the draw-heads, the request that if the plaintiff was injured by his failure to adopt the safer course, he can not recover, is well refused, if it does not appear that he had time to comprehend the safer way, and to adjust himself accordingly.

5. *Charge as to the duty of plaintiff.*—If, in an action by a brakeman against a railroad company for injuries, alleged to have been received while uncoupling cars, on account of the negligence of the engineer, there is evidence from which the jury might believe that the plaintiff's danger was not obvious to him, it is error to instruct the jury, that "If the jury believe from the evidence that it was impossible for plaintiff to have done this work without getting his arm in between the dead-woods, then the court charges the jury that he should not have done the work at all, and he can not recover in this action, if he attempted to do the work, if it were impossible to do so, and while so engaged was injured."

6. *Charge as to obeying the signals of the conductor.*—A charge that assumes that the engineer can not be negligent in operating his engine, if he does so in prompt and careful compliance with the signals of the conductor, is erroneous, where an act, however performed, would be a negligent one; and it is not for the court to assume the truthfulness of the testimony of the conductor that the signal given on a certain occasion was a proper one.

7. *Abstract, argumentative and misleading charges.*—Charges that are abstract, argumentative or misleading are properly refused.

APPEAL from City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This is an action by the appellee, Wm. E. Richie, against the Alabama Great Southern Railroad Company to recover damages for personal injuries to plaintiff.

The ground of the complaint, the negligence alleged, and the facts necessary to a full understanding of the decision are sufficiently stated in the opinion.

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On the examination of one J. B. Lasselle as a witness for the defendant, and after testifying that he was the conductor on defendant's train at the time of the injury to plaintiff, and had been in the railroad business about nine years, he was asked by the plaintiff on cross examination the following question: "Let us suppose that this car was standing on the incline and signal was given to give the slack, that is, to push the link in so the pin could be pulled out. Now, in a place of this kind, where the car was very heavy, and the train of cars very long, and the train was a very heavy train, as you represented, suppose the brakeman had been at the brakes, would there have been any difficulty by putting on the brakes, and by the use of the engine, to stop the train at any point?" This question was objected to by the defendant, on the ground that the complaint was that the engineer negligently jammed these cars back, and the examination of the defendant was confined simply to the allegations of the complaint, and that this question attempted now to place upon the railroad some other negligence than that charged in the complaint. The court overruled the objection, and the defendant excepted.

On the examination of this witness in rebuttal by the defendant, and after he had testified that the engineer, who was in charge of the engine at the time of the accident, was a competent engineer, and that he, the witness, had known him for several years and had always found him careful and competent, counsel for the defendant then asked him: "State whether or not he did what competent engineers usually do under like and similar circumstances, when this accident happened to the plaintiff?" The plaintiff objected to this question, which objection was sustained by the court and the defendant excepted. Counsel for the defendant then asked witness the following questions: "State whether or not he did anything more than what is ordinarily done under like circumstances by a competent engineer?" "Did he do at that time what a careful and skillful engineer would do under like circumstances?" "In obeying the signal which you, as a conductor, gave this engineer, could he have done otherwise than he did do?" Plaintiff objected to each of these questions when asked, each of which objections the court sustained, and the defendant separately excepted to each of the several rulings of the court.

On the examination by the defendant of T. M. Glazier, who was the engineer on the train at the time of the accident, and on testifying that he had been an engineer for over four years, the defendant's counsel asked him the

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following question: "State whether or not the movements you made with that train were the proper movements, and whether or not those movements were carefully made?" This question was objected to by the plaintiff, which objection the court sustained, and the defendant excepted. The defendant's counsel then asked this witness the following question: "State whether or not the movements of this train were the proper movements for uncoupling these cars at that place?" The court sustained the plaintiff's objection to this question, and defendant excepted. On the cross examination of this witness, the plaintiff's counsel asked him the following question: "Were there any brakemen on that train that day?" The defendant objected to this question because the complaint alleged that it was the carelessness of the engineer which caused the accident, and not anything that pertained to the action or negligence of the brakeman on the train, and this question called for evidence irrelevant to the issue formed under the pleadings. The court overruled this objection, and the defendant duly excepted. The witness answered that there were no brakemen on the train while they were switching.

Among the written charges given at the request of the plaintiff, to the giving of each of which the defendant separately excepted, were the following: (8.) "Railroads, like other corporations and persons, have the right to adopt reasonable rules and regulations for the government of their employes, and for their own protection; but they can not stipulate from immunity from liability for their own wrongful negligence. A rule which imposes upon an employe to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroads for negligence causing injury or death to their employe." (14.) "Even if it were shown that the negligence of the plaintiff proximately contributed to the injury complained of, proof that the accident would not have happened, notwithstanding the plaintiff's negligence, but for the want of ordinary care on the part of the engineer, after the engineer had knowledge that the plaintiff was in danger, if he did have such knowledge, the defendant company would still be liable and the plaintiff entitled to recover."

The defendant requested the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "The court charges the jury that the engineer of this train had the right to expect that the plaintiff would keep his arm in such a position as not to get it mashed between the cars; and if the jury believed from

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the evidence that the movements of the engine, by the engineer in this case, were such as were usually made under such circumstances, and that those movements were proper and carefully made, then they must find a verdict for the defendant." (11.) "The court charges the jury that it was the duty of the plaintiff to take into account the surroundings and perils attendant upon the nature of the services in which he was engaged, at the time he received his injuries, and to bestow such care and watchfulness as an ordinarily prudent person would have exercised under like circumstances in reference to their own safety; and if the jury further believe from the evidence that the plaintiff failed and neglected at the time when he was between the cars to bestow that degree of care, watchfulness and caution in respect to his own safety, in view of the surrounding danger, that an ordinarily careful and prudent person would have exercised under like circumstances, and that his failure in this respect contributed proximately to his injury, then the jury must find a verdict for the defendant." (14.) "If the jury believe from the evidence that it was impossible for plaintiff to have done this work without getting his arm in between the dead-woods, then the court charges the jury that he should not have done the work at all, and he can not recover in this action, if he attempted to do the work, if it were impossible to do so, and while so engaged was injured." (18.) "The court charges the jury that if they believe from the evidence that the engineer promptly and carefully obeyed the signals given to him by the conductor, then they must find a verdict for the defendant." (19.) "The court charges the jury that if there are two ways of doing a duty, one more dangerous than the other, an employee must adopt the safer course, and in this case, if they believed from the evidence, that in uncoupling these cars the plaintiff could have raised himself higher by placing his foot on the cross-tie on the outside of the rail, instead of putting his foot on the ground on the road bed, and if they believe further that such failure to put his foot on the cross-tie on the outside contributed proximately to his injury, he can not recover, unless they further believe that the engineer was guilty of willful, gross or wanton negligence, such as would overcome contributory negligence." (20.) "The court charges the jury that the case of the *Louisville & Nashville Railroad Company v. Watson*, which is read by counsel for plaintiff as a part of his argument, does not apply to the case at bar, the distinction being that in that case plaintiff was making a coupling in which he was obliged to put his

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hand between the draw-heads, while in this case plaintiff was uncoupling the cars, and was not compelled to put his arm or hand in between the draw-heads or the dead-woods."

There was judgment for the plaintiff. Defendant appeals; and assigns as error the various rulings of the City Court upon the evidence, and the charges given and refused.

A. G. SMITH, for appellant.—Charge 14 asked by the plaintiff should have been refused. It is well settled by the decisions in this State, that if a person is injured, and he was negligent and his own negligence contributed proximately to his injury, he can not recover, unless the person or corporation that did the injury, or its servants, were guilty of gross, wanton or reckless negligence, such as would amount to an intentional wrong. *R. R. Co. v. Kornegay*, 92 Ala. 228; *R. R. Co. v. O'Shields*, 90 Ala. 29; *R. R. Co. v. Crawford*, 89 Ala. 240; *R. R. Co. v. Webb*, 90 Ala. 185; *R. R. Co. v. Meadors*, 95 Ala. 137. The court erred in refusing to give to the jury charge No. 11, asked by the defendant. *M. & O. R. R. Co. v. George*, 94 Ala. 199. The general affirmative charge should have been given for the defendant. *R. R. Co. v. Ingram*, 98 Ala. 395; *M. & O. R. R. Co. v. George*, 94 Ala. 199; *R. R. Co. v. Orr*, 91 Ala. 548. An employee can not recover for an injury sustained when the danger is imminent and so obvious that a careful and prudent man would not incur the risk under the same circumstances. *R. R. Co. v. Walters*, 91 Ala. 435; *R. R. Co. v. Orr*, 91 Ala. 548; *Ry. Co. v. Holborn*, 84 Ala. 133. The court erred in refusing to give to the jury charge No. 19 requested by the defendant. The law is settled in this State that if there are two ways of discharging a service, one less dangerous than the other, the employee must select the least dangerous of the two. *R. R. Co. v. Walters*, 91 Ala. 435; *R. R. Co. v. Orr*, 91 Ala. 548; *R. R. Co. v. Holborn*, 84 Ala. 137; *R. R. Co. v. Graham*, 94 Ala. 545; *R. R. Co. v. George*, 94 Ala. 199.

JOHN M. MARTIN and CARL GANTZHORN, *contra*.—The court properly overruled the objection to evidence as to whether there were brakemen on the cars at the time of the accident, and if the brakes had been applied the injury would have been avoided.—*Helbig v. M. C. R. Co.* (Mich.) 48 N. W. 589; *K. C., M. & B. R. Co. v. Smith*, 90 Ala. 25; *Warden v. L. & N. R. R. Co.*, 94 Ala. 277; *Kellar v. Taylor*, 90 Ala. 289; *Brinkley v. The State*, 89 Ala. 34; *Graham v. Penn. Co.* 129 Penn. 149; 12 L. R. A. 293; 7 Amer. & Eng. Encyc. of Law,

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493; *McDonald v. The State*, (N. Y.), 27 N. E. 358; *Robinson v. Waupaca*, (Wis.) 46 N. W. 809. Charge 8 was properly given for the plaintiff.—*L. & N. R. R. Co. v. Orr*, 91 Ala. 548; *R. & D. R. R. Co. v. Jones*, 92 Ala. 218; *Hissong v. R. & D. R. R. Co.*, 91 Ala. 514; *Williams v. S. & N. R. R. Co.*, 91 Ala. 635. Charge 14 requested by the plaintiff was properly given Plaintiff's contributory negligence does not bar a recovery, where it is shown that he was in danger, and the fellow servant knew of this danger, but failed to use ordinary care, and that, by reason of such failure, plaintiff was injured.—*L. & N. R. R. Co. v. Watson*, 90 Ala. 68; *Hissong v. R. & D. R. R. Co.*, 91 Ala. 514; *Gilliam v. S. & N. R. R. Co.*, 70 Ala. 268; *M. & E. R. R. Co. v. Stewart*, 91 Ala. 421. Charge 1 asked by the defendant was properly refused.—*Carrington v. L. & N. R. R. Co.*, 88 Ala. 472; *Hussey v. The State*, 86 Ala. 34; *Snider v. Burks*, 84 Ala. 53; *E. T. Va. & Ga. R. R. Co. v. Thompson*, 94 Ala. 636; *Goodrich v. N. Y. C. & H. R. R. Co.*, 5 L. R. A. 750. Charge 11 was properly refused because it ignores the legal effect of the engineers negligence, which, in a proper case, will overcome the contributory negligence of the plaintiff.—*M. & E. R. R. Co. v. Stewart*, 91 Ala. 421; *L. & N. R. R. Co. v. Davis*, 91 Ala. 487; *M. & B. R. R. Co. v. Holborn*, 84 Ala. 133; *S. & N. Ala. R. Co. v. Donovan*, 84 Ala. 141. Charge 19 requested by the defendant was abstract, and, therefore, properly refused.—*Wilkinson v. Searcy*, 76 Ala. 176.

McCLELLAN, J—Richie prosecutes this action against the Alabama Great Southern Railroad Company claiming damages for personal injuries suffered by him while in the employment of defendant and in the discharge of his duties as a brakeman. The averment is that these injuries resulted from the wrong and negligence of a certain engineer in the employment of the defendant and, at the time and place of the accident, in charge and control of an engine attached to the train on which plaintiff was a brakeman or, to be more specific, it is alleged that at the time and place mentioned the plaintiff and the conductor and engineer of the train were engaged in taking out of the train and leaving on a side track certain freight cars, and that "whilst so engaged, it became and was the duty of plaintiff to go and be between two of said freight cars for the purpose of uncoupling the same; and the plaintiff in the line of his duty accordingly did go between said cars, and whilst there, that is between the cars aforesaid, he, the said engineer, did wrongfully and negligently drive and propel his

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said engine and cars to, against and upon the said plaintiff, thereby, then and there, catching and crushing the arm of said plaintiff between two of said freight cars, whereby plaintiff sustained great loss," &c. This is the only averment of negligence to be found in the complaint. Evidence was introduced by the plaintiff tending to show that the train, from which it was his duty to uncouple the last or rear two cars, was when he set about the performance of this duty standing still on a heavy up grade, that because of this grade the connections or couplings between the cars were taught, that is that the cars were separated as far as the links would allow them to be; and that in order for him to pull the pin out of the link which connected the cars he was to uncouple with that next in front, it was necessary "for the engineer to give him what is called 'the slack,' that is to run the cars back some so as to loosen the links in order that the pin might be drawn;" that he gave the engineer a signal to do this; and his theory is, that the engineer propelled the cars back with too much force, so that after the slack had reached the link from which he was to draw the pin, the cars still attached to the engine went unnecessarily far down the grade, and when he was in the act of laying the pin down on the draw-head of the car in front, it overtook the detached car, and their dead-woods came together and, catching his arm between them, inflicted the injuries for which he sues. The evidence also tended to show that the cars on this grade had to be held in position, and were so held on this occasion, by the engine on which the brakes or steam jam had been applied, that when the engine was released from its brakes, and allowed to run of its own motion down the grade, the cars would all move at the same time and together, and hence that no slack could be given in this way, but to that end it was necessary to give the engine steam and force the forward cars back faster than they would roll of themselves, and in doing this slack would be given at each successive coupling as the greater momentum of the engine reached it. This was the mode adopted to give slack at the point of the intended uncoupling. There was conflicting evidence, or inference at least, as to whether this jamming back of the cars was necessary in this instance, and also, conceding such jamming in some degree to have been necessary, as to whether it was not unnecessarily hard; plaintiff's evidence tending to show that it moved the cars at which he was engaged about two car lengths down the grade, when a movement of a foot and half only could

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have been made and would have been sufficient, or, as he expresses it, "the slack of a foot and a half would have been plenty to have come back at that time." The question thus being whether *the engineer* was negligent in jamming the cars too hard and too far down the track, the plaintiff was allowed, against defendant's objection, to prove that there was no brakeman on the train at the time, the others as well as plaintiff being employed about the switching; and also against defendant's objection, that, "in a place of this kind, where the car [grade] was very heavy, the train of cars very long, and the train was a very heavy train," if the brakemen had been at the brakes there would have been no difficulty "by putting on the brakes, and by the use of the engine, to stop the train at any point." We are unable to see that this evidence, that if brakemen had been at the brakes, they could have promptly stopped the train, can possibly perform any other office in this case than as tending to show that the defendant through its agents was negligent in not having brakemen on the cars at that time and place; that but for this negligence, the train could and would have been stopped before the dead-woods came together crushing plaintiff's arm, and hence, that in consequence of this negligence, which is not averred in the complaint, the defendant is liable, and the jury should so find. The fact that brakemen, if they had been in position, could have stopped the train has no tendency toward proving the alleged negligence of the engineer. It may have been proper to show the fact that the brakemen were not at the brakes, or that the car brakes were not relied on or used in this movement of the train, for the purpose of emphasizing before the jury that whatever was done or attempted to be done in moving and stopping the train was done or attempted by the engineer, and that, therefore, whatever was wrong or negligent in that behalf must have been due to the wrong or want of care and diligence of the engineer, and it was nowhere in the case pretended that the brakemen were in their places or that the brakes on the cars were resorted to; but to show that had they been there the train could have been stopped short of the accident was to show that somebody in defendant's employment was negligent in not having them there, and serves to inject into the case an issue of negligence *vel non* of which there is no hint in the pleadings. The court erred in the admission of this evidence.

We have considered the evidence in this record with great care with reference to the inquiry whether it involves any tendency to show negligence on the part of the engineer

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in the premises. It would subserve no good end to discuss it in detail, and we will content ourselves in this connection with the statement of our conclusion, arrived at with some difficulty, and entertained with more misgivings as to its correctness than could be desired, that there is some evidence tending to show that the engineer was negligent to go to the jury. On the other hand, there is unquestionably a tendency of the evidence to show that the plaintiff himself was negligent and that, assuming the negligence of the engineer, the want of due care and diligence on the part of the plaintiff, as shown by this aspect of the testimony, contributed proximately to the injury sustained by him.

It being thus with the jury to find either that the engineer was or that he was not negligent, or, finding that he was negligent, to find further that plaintiff was not in the exercise of that prudence and diligence which a man of ordinary care and caution would have exercised under the circumstances; and if their conclusion was that both parties were guilty of wrong or negligence contributing proximately to the disastrous result, their duty was to return a verdict for the defendant, *unless* it was open to them, on the testimony, to further believe and find that the engineer knew or had reason to believe that the plaintiff was exposed to the peril from which the injury resulted, and failed, after he had this knowledge or reason to believe the fact, to exercise the care and diligence which a man of ordinary care and diligence would have exercised in the premises to save the plaintiff harmless in spite of his own want of care. Such failure under the circumstances hypothesized is deemed in the law, as frequently declared by this court, the equivalent of that indifference to threatened damnifying results, that wantonness, willfulness or conscious wrong, for injuries attributable to which the plaintiff may recover notwithstanding his own contributory negligence.

Very many of the rulings of the trial court proceeded, and can be sustained only, on the assumption that there was evidence in this case tending directly or through inference to show that the engineer with a knowledge of plaintiff's peril failed to exercise due care and diligence to save him from the consequences of his own negligence. The assumption is, in our opinion, unsupported and gratuitous. We are unable to find any such evidence in this record. There is no testimony which affords even an inference that the engineer ever knew or had reason to believe that the plaintiff was exposed to the danger from which he suffered the injuries counted on until after those injuries had been sustained. What he did

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know, and all that he knew or had reason to believe, was that the plaintiff was between the cars. The danger incident to being between the cars simply was not the source of plaintiff's hurt. So long as the dead-woods were in tact—and they were so throughout the occurrences involved here—the plaintiff was not endangered by any thing the engineer did or omitted to do having relation merely to the plaintiff's presence there. Within the lines of the cars and between them there was, as against any thing that happened on this occasion, an absolutely safe place for plaintiff to be. There was also another place between the cars which, under any and all circumstances when the cars were moving or about to move, is infinitely more dangerous than the first mentioned; and it was from the peril incident to the plaintiff's being in this more dangerous place that the injuries ensued. Though between the cars, plaintiff would not have been hurt at all, but for being in this particular place of especial danger between them. If it was plaintiff's duty to be between the cars, it was equally his duty not to put himself at that spot between them at which the dead-woods came together. And it being the plaintiff's duty to keep his person free from the point of contact between these dead-woods, and a duty the performance of which was prompted by every sense and instinct of self preservation under the circumstances shown here, and which, for ought that the engineer could or did know, was entirely feasible and practical of performance, the engineer had a right to assume that it would be performed, and, of consequence, that it would not endanger plaintiff for him to move the train as he did move it, and was not even probably necessary to the conservation of plaintiff's safety that he should do any thing which he omitted to do or omit any thing which he in fact did; it being perfectly manifest that had plaintiff's person been outside of the dead-woods between the cars, as any reasonable man knowing he was in there would have supposed it to be, the conduct of the engineer would have involved no injury to him.

This case is essentially unlike the case of *Louisville & Nashville R. R. Co. v. Watson*, 90 Ala. 68, and *Hissong v. Richmond & Danville R. R. Co.*, 91 Ala. 514, upon which reliance is had by the appellee. In *Watson's Case* the engineer not only knew that the plaintiff was between the cars, but there was evidence from which the jury might have inferred that he knew or had reason to believe plaintiff's hand was between the bumpers of the cars—the draw-heads, which also performed the functions of dead-woods—and with this

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knowledge caused the engine to "jump back"—the space between the bumpers being only a few inches—so suddenly and with such force as to allow no time for plaintiff to extricate himself. There is no such evidence here—that the engineer knew or had any reason to believe that plaintiff's arm was between the bumpers at all—and hence none of knowledge or reasonable belief on his part that plaintiff was in the perilous position from which alone he suffered. The same is substantially true of *Hissong's Case*. There the plaintiff had in effect informed the engineer that the work he was to do between the cars could not be done while they were in motion. The engineer accordingly stopped the train, and the plaintiff went between the cars, and while working at the coupling, supposing, as he had a right to do, that the train would not move until he so signalled the engineer, and acting, as the jury might have inferred, in a manner that was safe only on the assumption of the train remaining at rest, the engineer started his engine and moved the car over plaintiff's person. Having been requested to stop that the work might be done, after an effort to do it while his engine was in motion had failed, the clear implication to the engineer was that plaintiff had to be and was in a position which any movement of the train would render perilous, and he had no right to assume the safety of it. And in *Hissong's Case*, as in *Watson's*, the peril which culminated in the injury complained of was incident to the position in which the engineer knew, or had reason to believe, the plaintiff to be when he moved the train. Here, as we have seen, quite the reverse is true. The peril of this plaintiff was incident to a particular position which it was plaintiff's duty to avoid, which, so far as the engineer could know or have any reason to believe, there was no necessity or occasion for him to assume, and which there was nothing to suggest plaintiff's occupancy of to the engineer at the time he set the train in motion, or at any time while it was in motion. We are unable to say that the evidence affords any ground to impute to him such knowledge or reasonable belief as to the peril of plaintiff's position as that his subsequent conduct in the movements of the engine involved a want of ordinary care with reference thereto. And if this case is tried again on the evidence before us, but two issues will arise, namely, first, whether the engineer was originally negligent; and second, whether the plaintiff was guilty of contributory negligence, in allowing his arm to get between the dead-woods.

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What we have said last above will suffice to indicate the grounds of our opinion that many of the charges refused to the defendant should have been given, and also the particular charges referred to.

The danger to plaintiff from putting his arm where it was caught between the dead-woods was not necessarily obvious to him, that is, the jury might have found that it was not, if they believed there was a second lurch of the train against the car that had been uncoupled, and hence charge 14 was properly refused.

Charges 15 and 17, requested for defendant, present questions that need not arise on another trial.

Charge 18 assumes that an engineer can not be negligent in operating his engine, if he does so in prompt and careful compliance with the signals of the conductor. This is not true where the act commanded, however performed, would be a negligent one, and it was not for the court to assume, as the giving of this charge would have involved its doing, that the testimony of the conductor, to the effect that the signals given by him on the occasion in question were the proper signals to be given and commanded the doing of proper acts by the engineer, was true.

The 19th charge of defendant's series was well refused. Its statement of the general proposition of law is, of course, sound; but we are not prepared to say that the rule stated is applicable to the facts therein hypothesized. If, under the circumstances, the plaintiff had time and occasion to see and comprehend that the safe way to lay the pin on the draw-head was to stand on the cross-tie, and had time to thus adjust himself, he should have done so; but these considerations are not hypothesized in the instruction as framed.

Charge 20 is in the nature of an argument, and was well refused on that ground.

Of the charges given for plaintiff that numbered 8 may have involved a tendency to mislead as to the true interpretation of the rule of the defendant company, which was put in evidence, but is not otherwise objectionable; and that numbered 14 is abstract.

The rulings on the admissibility of testimony are free from error, except in the particular considered in the outset of this opinion.

Reversed and remanded.

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Action by Employee against a Railroad Co. for Damages on Account of Personal Injuries.

1. *Pleading; amendment.*—While it is the better practice, when a complaint is amended, to set out in full the complaint, or count thereof as amended the pleader may amend by reference to one count in the complaint, adopting a certain portion of it, by adding certain averments thereto, so as to constitute another and separate count.

2. *Same.*—Where a demurrer has been sustained to a complaint consisting of a single count, it is objectionable to amend the complaint, by the addition of several counts, by reference to and adoption of the original count; a demurrer having been sustained, the complaint was annulled.

3. *Averment of negligence in the complaint.*—In an action by a conductor against a dummy railroad company, for personal injuries, caused by a train running into an open switch, and throwing him from one of the cars, a count of the complaint, which alleges that the injuries were inflicted because "the switch from the main line into the siding on to which said train ran was negligently allowed to be and remain without a lock or other sufficient means of fastening the same," states a good cause of action.

4. *Same.*—But the averment in one of the counts of said complaint, that the switch "was negligently allowed to remain open," without other allegations of negligence, is insufficient.

5. *Defect in road-way; not having proper lock or fastening upon switch.* Whether a lock or proper fastening is such a component part of the switch as that the failure to provide it renders a railroad company liable for injuries resulting therefrom, is determined by utility and the usage and custom of well regulated roads.

6. *Same; knowledge of conductor.*—Where, in an action against a railroad company by a conductor for injuries, alleged to have been caused by reason of defects in the condition of the ways, works or machinery of said road, it is shown that the plaintiff had known of the defect complained of for a year prior to the injury, and remained in the employment during that time, he will be held to have assumed the risk, and to be guilty of such contributory negligence as precludes a recovery.

7. *Volenti non fit injuria.*—The doctrine of *volenti non fit injuria* is not changed by the provisions of section 2590 of the Code of 1886; and an employee, with knowledge of a defect in the ways, works or machinery, who continues in the service of his employer after the lapse of a reasonable time for its remedy, assumes the risk incident to such defect, and can not recover for injuries which he receives in consequence thereof.—(*M. & B. R. R. Co. v. Holborn*, 84 Ala. 133; *H. A. & B. R. R. Co. v. Walters*, 91 Ala. 485 overruled.)

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APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, W. L. Allen, against the appellant, the Birmingham Railway & Electric Company, to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant.

The complaint as originally filed contained but one count, which was in the following language: "The plaintiff claims of the defendant fifteen thousand dollars for that heretofore on to-wit: 1st day of July, 1891, defendant was operating, running, managing and controlling a certain railway known as the East Lake Dummy Line, running from Birmingham in an easterly direction to and by Fritchman's Garden, to East Lake, Alabama. That on said day, plaintiff was in the service or employment of defendant in the capacity of conductor on a certain train, composed of a steam locomotive engine and certain cars, which was then and there being run over and along said railway by defendant; that when said train reached a point on said railway at or near said Fritchman's Garden it ran from the main line on to a switch or siding, and plaintiff by reason thereof was thrown from one of said cars, on which car plaintiff then and there was in the performance of his duty as conductor as aforesaid, and plaintiff's leg was fractured, his hip, shoulder and head and various other parts of his body bruised and lacerated, and plaintiff was otherwise seriously and permanently injured. By reason of his said injuries plaintiff suffered and continues to suffer great mental and physical pain, and loss of time, and plaintiff was rendered less able to work and earn money, and was put to great expense for medicine, medical attention, care and nursing, and plaintiff avers that his said injuries are permanent. Plaintiff avers that defendant negligently caused or allowed the track of said railway, at or near said switch, or said switch to be in a defective condition, and the said accident and plaintiff's said injuries resulted therefrom. Plaintiff further avers that said accident and plaintiff's said injuries were caused by reason of defects in the condition of the ways, works, machinery or plant connected with or used in said business of defendant, viz., said switch was in a defective condition, said track at or near said switch was in a defective condition, said switch was negligently allowed to be open, said switch was allowed to be and remain without a lock or other proper and sufficient means for fastening the same, said switch was negligently allowed to be and remain without a light or other proper and sufficient means by

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which it could be told by the engineer or fireman on said train which way said switch was set. The said defects arose from or had not been discovered or remedied owing to the negligence of defendant, or of some person in the service of defendant and entrusted by it with the duty of seeing that said ways, works, machinery or plant were in proper condition. Plaintiff further avers that said accident and his said injuries were caused by reason of the negligence of a person in the service or employment of defendant, who had the charge or control of said switch, viz., said person negligently caused or allowed said switch to be then and there open. Plaintiff further avers that said accident and his said injuries were caused by reason of the negligence of a person in the service or employment of defendant, who then and there had the charge or control of said engine, viz., said person negligently caused or allowed said engine pulling said train to run upon or through said switch. All to plaintiff's damage fifteen thousand dollars, hence this suit." The defendant filed several demurrers to this count of the complaint, which were confessed by the plaintiff. Thereupon the plaintiff amended the original complaint as follows: "Comes the plaintiff in the above styled cause, and, by leave of the court first had and obtained, amends his complaint by adding thereto the following additional counts: 2d count. Plaintiff refers to and adopts as a part of this the second count all that part of the first count from the beginning thereof down to and including the words, 'that his said injuries are permanent,' where they first occur in said count; and plaintiff further avers that said accident and plaintiff's said injuries were caused by reason of defects in the condition of the ways, works, machinery or plant connected with or used in said business of defendant, viz., the switch from the main line into the siding, onto which said train ran as aforesaid, was in a defective condition. The said defects arose from or had not been discovered or remedied owing to the negligence of defendant, or of some person in the service of defendant and entrusted by it with the duty of seeing that said ways, works, machinery or plant were in proper condition.

"3d count. Plaintiff refers to and adopts as a part of this third count all of the second count of this complaint except the following sentence thereof, 'The switch from the main line into the siding, onto which said train ran as aforesaid, was in a defective condition.' And plaintiff inserts as a part of this 3d count in lieu of said sentence, and in the corresponding position of said sentence, the following words, viz.,

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the switch from the main line into the siding, onto which said train ran as aforesaid, was negligently allowed to be and remain without a lock or other proper and sufficient means of fastening the same, and the same was not kept sufficiently locked or fastened.

"4th count. Plaintiff refers to and adopts as a part of this the fourth count of his complaint all of the second count of this complaint except the following sentence thereof, viz., 'The switch from the main line into the siding, onto which said train ran as aforesaid, was in a defective condition;' and plaintiff inserts as a part of this 4th count in lieu of said sentence, and in the corresponding position of said sentence, the following words, viz., the switch from the main line into the siding, onto which said train ran as aforesaid, was negligently allowed to be open.

"5th count. Plaintiff refers to and adopts as a part of this the 5th count of his complaint all of the second count of this complaint except the following sentence thereof, viz., 'The switch from the main line into the siding, onto which said train ran as aforesaid, was in a defective condition;' and plaintiff inserts as a part of this 5th count, in lieu of said sentence and in the corresponding position of said sentence, the following words, viz., the switch from the main line into the siding, onto which said train ran as aforesaid, was negligently allowed to be and remain without a light, target or other proper and sufficient means by which it could be told by the engineer or fireman on said train which way said switch was set.

"6th. Plaintiff refers to and adopts as a part of this the 6th count of his complaint all that part of the first count of the complaint from the beginning thereof down to and including the words, 'That his said injuries are permanent,' and plaintiff further avers that said accident and his said injuries were caused by reason of the negligence of a person in the service or employment of defendant who had the charge or control of said switch and siding, and of the switch leading from the main line into said siding, viz., said person negligently caused or allowed same to be so set that said train ran into said siding as aforesaid."

Defendant demurred to the second count of the complaint, and assigned the following grounds of demurrer: 1. There are no facts averred in said count of said complaint which show that plaintiff was in such relationship to defendant at the time of his injury that defendant owed him the duty to keep its switch in proper condition. 2. There are no facts averred in said count of said complaint which show in what the al-

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leged defect consisted. 3. Said count is incomplete, indefinite and uncertain. Defendant demurred to the third count of the complaint on the same grounds as to the second count, and in addition thereto assigned the following: 4. There is no averment of any facts which show with sufficient certainty that it was the duty of defendant to keep a lock on its switch and to keep its switch locked. Defendant demurred to the fourth count of the complaint upon the same grounds as to the second count thereof, and added thereto the following: 4. There is no averment of any facts which show that an open switch was a defect in the ways, works, machinery or plant of defendant. 5. There is no averment of any facts which show that it was the duty of defendant to keep its switch closed. Defendant demurred to the fifth count of the complaint assigning the same causes of demurrer as are assigned to the second count, and in addition thereto the following: 4. There are no facts averred which show with sufficient certainty that it was the duty of defendant to keep its switch lighted, or to have a target or other appliance by which the engineer and fireman could see how the switch was turned. Defendant demurred to the sixth count of the complaint and assigned the same causes of demurrer as are assigned to the second count, adding thereto the following: 4. It is not averred in said count of said complaint with sufficient certainty who was the person whom it is alleged was in the service and employment of defendant, and had charge of said switch, and negligently caused or allowed said switch to be open. These demurrers to each of the counts were all severally overruled by the court; and issue was thereupon joined on the pleas of the general issue and contributory negligence.

The facts as disclosed by the bill of exceptions were, that the plaintiff was a conductor on a dummy train of defendant, which was on its way from East Lake to Birmingham about 7:15 o'clock on the evening of the 1st of July, 1891; that the train, as it was passing a side track at Fritchman's Garden, a station on the line between East Lake and Birmingham, ran into an open switch on to the side track. The plaintiff was on the front platform of the front coach, next to the engine, where, according to the testimony of the defendant, he was standing without holding on to any thing, and where he had gone, according to his own statement, to collect the fare of a passenger he thought was on the platform. As the train ran into the open switch, it was diverted from a straight line, and the lurch occasioned thereby caused him to be thrown off of the platform, and he received

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the injuries complained of. The negligence complained of was that there was no lock on the switch, nor was there a target or light thereon. As is stated in the opinion, the undisputed evidence was that the plaintiff had been in the employment of the defendant for twelve months, and during that time there had never been a lock on the switch, or light, or target thereon, and that this was known to the plaintiff. There were several exceptions reserved by the defendant to the rulings of the court upon the testimony, but the opinion of the court renders it unnecessary to notice these rulings in detail. The court, at the request of defendant, gave the general affirmative charge in its behalf as to the fourth and sixth counts of the complaint.

Among the written charges which were requested by the defendant, and to the refusal to give each of which the defendant duly excepted, were the following: (8.) "That if the jury believe from the evidence that it was dangerous to use the switch without a lock, and that the plaintiff had been running over the road for a year with full knowledge that there was no lock on said switch, then I charge you that it would be negligence for him to stand upon the front platform without holding." (9.) "If the jury believe that the plaintiff knew that the defendant did not have a switch lock on the switch through which the train ran for twelve months prior to the accident, and did not communicate such fact to any one in the service of the defendant superior to him, they must find for defendant." (17.) "That if the jury believe from the evidence that it was dangerous to operate defendant's railroad without a lock on the switch mentioned in the complaint, and that plaintiff had been running on said road as conductor or otherwise for nearly one year or more before the alleged injury, with full knowledge that said switch had no lock on the same, and if you further believe that plaintiff went out and stood upon the platform of one of defendant's cars without holding to something, if he could have held to something, then I charge you that plaintiff was guilty of negligence, and if you believe if he had held on to something which he could have held on to, while on the platform, he would not have fallen off and been injured, then I charge you that your verdict must be for defendant."

It is not deemed necessary to set out in this statement the many other charges asked by defendant, to the refusal to give each of which a separate exception was reserved.

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There was judgment for plaintiff, and, on this appeal by defendant, the rulings of the trial court on the pleadings, evidence and upon the charges are assigned as error.

HEWITT, WALKER & PORTER, for appellant.—The court should have sustained the defendant's demurrers to each of the counts of the complaint as amended.—*Columbus & Western R. R. Co. v. Bradford*, 86 Ala. 574; *Ensley Railway Co. v. Chewning*, 93 Ala. 24; *Leach v. Bush*, 57 Ala. 154; *Phoenix Ins. Co. v. Moog*, 78 Ala. 301; *Batton v. S. & N. Ala. R. R. Co.*, 77 Ala. 591; *L. & N. R. R. Co. v. Hall*, 91 Ala. 121. The burden was on the plaintiff to show that the absence of the switch lock was the proximate cause of his injury.—*Joy v. Winnisimmet Co.*, 114 Mass. 63; *Deyo v. N. Y. C. R. R. Co.*, 34 N. Y. 7; 16 Amer. & Eng. Encyc. of Law, p. 445. The continuance of the plaintiff in the service of the defendant, after the knowledge of the defect in the road-way, rendered him guilty of contributory negligence, and prevents a recovery.—*Ga. Pac. R. R. Co. v. Davis*, 92 Ala. 300.

BOWMAN & HARSH, *contra*, on application for re-hearing, cited, *M. & B. R. R. Co. v. Holborn*, 84 Ala. 153; *H. A. & B. R. R. Co. v. Walters*, 91 Ala. 435; *Scanlon v. Boston & A. R. Co.*, 18 N. E. Rep. 209; *White v. Nonantum Worsted Co.*, 144 Mass. 276; *Soeder v. St. Louis I. M. & S. Ry. Co.*, 13 S. W. Rep. 714; 100 Mo. 673; *Faren v. Sellers*, (La.) 3 So. Rep. 363; *L. & N. R. R. Co. v. Hall*, 87 Ala. 708; *Woutilla v. Duluth Lumber Co.*, 37 Minn. 153; 33 N. W. Rep. 551.

COLEMAN, J.—The action is to recover damages for personal injuries. It is much the better practice, when a complaint is amended, to set out in full the complaint or count as amended, unless the amendment is of such a character that it may be readily made by a mere interlineation. We have, however, never construed the statute allowing amendments so strictly as to hold that the pleader may not, by reference to one count in the complaint, adopt a certain specified portion of another, and add to it averments, so as to constitute another and separate count.

The complaint is subject to another objection. As originally found, there was but a single count. The court sustained a demurrer to the complaint. The effect of the judgment sustaining the demurrer was to annul and hold for naught the complaint in its then condition. Until amended, or a new complaint filed, there was no 1st count before the court. The complaint was amended by adding thereto a

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second, third, fourth, fifth and sixth count. Each of these amendatory counts refers to and adopts as a part of these respective counts a specified portion of the 1st or preceding counts.

We will consider the sufficiency of the counts upon which the trial was had. The third count adopted a portion of the first and the whole of the second, with the exception of a single sentence. Written out consecutively in full it reads as follows:

"The plaintiff claims of the defendant fifteen thousand dollars, for that heretofore, on, to wit, 1st day of July, 1891, defendant was operating, running, managing and controlling a certain railway known as the East Lake Dummy Line, running from Birmingham in an easterly direction to and by Fritchman's Garden, to East Lake, Alabama. That on said day plaintiff was in the service or employment of defendant in the capacity of conductor on a certain train, composed of a steam locomotive engine and certain cars, which were then and there being run over and along said railway by defendant, that when said train reached a point on said railway at or near said Fritchman's Garden, it ran from the main line into a switch or siding, and plaintiff by reason thereof was thrown from one of said cars, on which car plaintiff then and there was in the performance of his duty as conductor as aforesaid, and plaintiff's leg was fractured, his hip, shoulder and head and various other parts bruised and lacerated, and plaintiff was otherwise seriously and permanently injured. By reason of his said injuries plaintiff suffered and continues to suffer great mental and physical pain and loss of time, and plaintiff was rendered less able to work and to earn money, and was put to great expense for medicine, medical attention, care and nursing, and plaintiff avers that his said injuries are permanent; and plaintiff further avers that said accident and plaintiff's said injuries were caused by reason of defects in the condition of the ways, works, machinery or plant connected with or used in said business of defendant, viz., the switch from the main line into the siding onto which said train ran as aforesaid was negligently allowed to be and remain without a lock or other proper and sufficient means of fastening the same, and the same was not kept sufficiently locked or fastened. The said defects arose from, and had not been discovered or remedied owing to the negligence of defendant, or of some person in the service of defendant and entrusted by it with the duty of seeing that said ways, works, machinery or plant were in proper condition."

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The words, "and the same was not kept sufficiently locked or fastened," may be stricken out as mere surplusage and enough remains to constitute a good count. We do not think these words, in the connection used, indicate that the plaintiff sought a recovery for negligence in not having the switch locked or fastened, but rather that it was not locked or fastened in consequence of the allegation that there was neither lock nor fastening to the switch. Whether a lock or proper fastening was such a component part of a switch, as that the failure to provide it rendered the company liable for injuries resulting therefrom, would depend upon the proof.

Upon this question the rule is clearly laid down in *L. & N. R. R. Co. v. Hall*, 91 Ala., on page 121, where, in reference to "whipping straps," the court said: "Is it so manifestly serviceable as to command the consensus of intelligent railroad men so generally, as that it cannot be reasonably ignored or disregarded? Or, is its utility disbelieved and disallowed in the management of many well governed and well regulated railroads? If this question be debatable and skilled railroad men honestly differ in judgment as to the utility of this or any other cautionary appliance, and differ to such extent as that many well regulated railroads abstain from their use, then such abstraction is not legal negligence." In the case of *Hall*, the principle was applied to roads commonly designated railroads. In the present case the road is designated and distinguished as a dummy road, but there can be no difference in the application of the principle.

If it be shown that the omission to provide a lock or proper fastening for the switch was culpable negligence, and the negligence arose as averred in the complaint, and the switch was displaced by an intermeddler, such displacement would not be necessarily such an intervention of an independent intervening cause, as to constitute the sole proximate cause of the injury. The evident purpose of the use of locks or fastenings is to make the switch reasonably safe against the interference of, or displacement by trespassers, as well as accidental causes. In such cases ordinarily the neglect of the defendant in failing to provide locks or fastenings, would be regarded at least as jointly contributing to the result.

The fourth count is clearly defective. The averment that the switch "was negligently allowed to be open," does not show a defect in the ways, works, and machinery of the defendant corporation, neither has such an averment any legal or proper connection, with the person whose duty it is to

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see that the ways, works and machinery were in proper condition. This count demonstrates the danger and confusion likely to arise in pleading by adopting portions of other counts by a mere reference to them. The safe practice is to draw the counts in full, as one entirety. With the exception of the defect pointed out in another part or this opinion, the other counts are sufficient, and the demurrers properly overruled.

The evidence shows without dispute that plaintiff had been in the employ of the defendant as conductor for a year. He testified himself "that the switch had no light or target on it, and had not since I had been running on the road. There never had been a lock or means of fastening on it since I went on the road, a period of twelve months. I had been running on the road for twelve months."

In the case of *The Columbus & Western R. R. Co. v. Bradford*, 86 Ala. 574, the court used this language: "Contributory negligence, which would defeat an action, might have consisted of a failure on the part of the plaintiff, either to reasonably give notice of the defect in appliances used in his employment, or of the negligence of his superiors, if known to him, which produced the injury; or of a failure, after having given such notice, to quit the service to which such defect or negligence was incident, after a reasonable time had elapsed for its correction."

In *Georgia Pacific v. Davis*, 92 Ala. 300, the principle is thus clearly stated: "The duty of the company to its employees is to provide a roadway in all respects reasonably safe for the running of its trains, and the performance of the functions imposed upon them by the exigencies of the service, and they have the right to assume without inquiry or investigation that this duty has been discharged. The *onus* of inquiry or investigation is not upon them. If, as matter of fact, they know of unsafe conditions in any of these particulars, and continue in the service after the lapse of a reasonable time for the defects to be remedied or removed, they assume this additional risk, though originally not incident to their employment." Many cases are cited in support of the proposition, and it is manifestly just. If it be conceded that the failure to provide a lock or proper fastening for the switch be a culpable defect, there are no facts in the present record which relieve the plaintiff from being held guilty of contributory negligence under the influence of the foregoing principles.

Reversed and remanded.

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(Response to application for re-hearing.)

COLEMAN, J.—The evidence is conclusive and without conflict that the plaintiff voluntarily and without objection continued in the employment of the defendant for a period of twelve months in the almost daily use of, and with a full knowledge of the defect in the ways, works and machinery, alleged to have caused the injury. Under this proof the court held, that the plaintiff was guilty of contributory negligence. We are now asked to revise this conclusion. Considered in connection with the evidence, as a general proposition of law, the rule asserted is sustained by an overwhelming array of authorities.

In the case of *Rush v. Missouri Pacific R. R. Co.*, 28 Amer. & Eng. Railroad Cases, 484, the court uses this language: "There are cases where a servant knowing the danger may nevertheless recover; but this is not one of the cases; usually where some instrument or appliance has become unsafe from use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in his master's employment, and use it for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition. Also when the master has been informed with regard to some defect in some instrument or appliance, and he agrees to remedy the defect, the servant may continue for a reasonable time in the master's employment, so as to give him an opportunity to fulfil his promise. Also when the danger is one to which the servant is not exposed in the ordinary course of his employment, but one which he is at the time required immediately to encounter by a special command by his master or of a superior servant, without time for reflection or choice on the part of the servant, he may obey the command without being guilty of contributory negligence, or without forfeiting his right to recover in case injury results. But not one of these cases is the present case. The plaintiff's intestate could have had no hope in the present case that the railway's tracks would ever be changed; there was no promise that they would be changed; they were just as they were when originally constructed; and in the ordinary course of his employment the plaintiff's intestate was using them every day, and knew that he must so use them every day." Under the evidence it was held to be a question of law for the court, and that as to plaintiff the defendant was not guilty of culpable negligence.

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In the case of *O'Rorke v. Union Pacific Railway Co.*, 22 Fed. Rep. 189, Brewer, J., uses the following language: "He [the employe] has the right to wait a reasonable time; to consider the circumstances of the case, and to give notice to his employers that he is in danger; time enough to see whether the employer means to have the defect remedied; time enough to see the general way in which he conducts his business; and if he finds that his employer intends to use machinery with defects, or to conduct his works in a dangerous way; finds that is to be his general habit; finds that, after he has been notified, he still intends to conduct his business in that way, and then goes on and continues in the work, it is fair to assume that he takes the risk."

In *Richards v. Rough, et al.*, 53 Mich. 212, the general proposition is stated as follows: "A servant who continues without objection to use machinery which he has found to be unsafe, assumes the risk, and can not recover for injuries which he may receive in consequence of doing so."

The same rule prevails in Wisconsin. *Dorsey v. The Phillips & Colby Construction Co.*, 42 Wis. 583. Many authorities from other courts might be cited.

This State has declared the law in the same unmistakable terms. In *Eureka Co. v. Bass*, 81 Ala. 201, it is said; "If the employee, while engaged in the service, acquires knowledge of any defect in the materials, machinery or instrumentalities used, and notice thereby of an increased risk or danger, and afterwards continues in the service without objection or notice to the employer, he assumes the increased risk himself; but he may notify the employer of the defect, and continue in the service for a reasonable time relying on the employer's promise to remedy the defect; yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence."

In the case of the *L. & N. R. R. Co. v. Hall*, 87 Ala. 708, which arose under the employer's act, the doctrine was distinctly declared, that although the defendant may have been guilty of negligence in the erection and construction of its bridge, if plaintiff knew of the danger, and failed to exercise due care to avoid the danger, and was injured, he would be guilty of contributory negligence. This rule also prevailed in the English courts.

It is contended, however, that the rule as here stated has been changed by statute, and that under the employer's act, section 2590 of the Code and sub-sections, the employe does not assume the responsibilities of injuries caused by defects

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in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer, although known to the employe, and that under the statute he may remain with impunity in the employment of his employer for any length of time, after he becomes aware of the danger, provided the master or employer is aware of such defect; and we are referred to the case of *Mobile & Birmingham R. R. Co. v. Holborn*, 84 Ala. 133, and the case of *Highland Ave. & Belt R. R. Co. v. Walters*, 91 Ala. 435. The case of *Holborn*, 84 Ala. supports the argument and position of appellee, and if that decision furnishes a proper construction of the employer's act as found in section 2590 of the Code, the opinion rendered in the case under consideration is wrong, for in the *Holborn Case* it is held, that the rule as declared in the *Eureka Co. v. Bass*, *supra*, which we have cited, is abolished.

The employer's act, as found in section 2590 and subdivisions, is a substantial, if not an exact, copy of the English act of 1880. This court is not finally concluded by the decision of any other State court or the British court, in their construction of a similar statute, but the opinion of learned courts upon similar questions are entitled to great weight, and this is especially true when the statute, from which ours was copied, had been construed prior to its enactment by our legislature. *Armstrong v. Armstrong*, 29 Ala. 538.

In the case of *Griffiths v. London & St. Katherine Docks Co.*, 13 Queen's Bench Division 259, it is said: "If the danger is on which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *prima facie* case, it is necessary that they should be shown to exist in the statement of the claim."

The case of *Weblin v. Ballard*, reported in 17 Queen's Bench Division, 122, cited in *Holborn Case*, *supra*, supports the conclusion reached in that case; and if the case of *Weblin v. Ballard* had remained in force as the proper construction of the statute, we would be bound to hold that the construction given by this court to the statute in the *Holborn Case* was the same as that given by the English courts. In the same volume, 17 Q. B. D., p. 414, the case of *Thomas v. Quartermaine*, which involved the same question, came up for consideration, and the reasoning of the court tended greatly to weaken the decision of *Weblin v. Ballard* as an authority. The case of *Thomas v. Quartermaine* was appealed, and in 18 Q. B. D. 685, the case of *Weblin v. Ballard*

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was virtually, though not in express words, overruled. The court held in *Thomas v. Quartermaine*, 18 Q. B. D. 685, that the doctrine of "*volenti non fit injuria*" ("that to which a person assents is not esteemed in law an injury." Broom's Legal Maxims) applied under the employer's act of 1880. Bowen, J. uses this language: "Knowledge is not a conclusive defense itself. But when it is a knowledge under circumstances that leave no inference but one, viz., that the risk has been voluntarily encountered, the defense seems to be complete." Lord Esher, M. R., dissented from the conclusion of the court. The question arose again in the case of *Yarmouth v. France*, 19 Q. B. D. 647, and it was held, Lord Esher, M. R. rendering the opinion, "that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of the foreman and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff." In this case there was also a dissenting opinion by Lopes, J., not as to the law, but upon the facts, the latter Judge holding "there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment." In this case Lord Esher, M. R. stated that the doctrine "*volenti non fit injuria*" applied under the employer's act of 1880. His conclusion of the opinion is in the following language: "I see nothing in the decision in *Thomas v. Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, implidely agreed to incur it." In the same case Lindley, J., after referring to the case of *Thomas v. Quartermaine* and the sections of the act, held that "the maxim *volenti non fit injuria* is applicable, and that if a workman, knowing and appreciating the danger and risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles in my opinion are perfectly sound."

The act came up for consideration again in the case of *Osborn v. London & North Western Railway Co.* 21 Q. B. D. 220, in which the principles of law declared by Lord Esher, M. R. in the case of *Yarmouth v. France*, *supra*, by Bowen, L. J. in *Thomas v. Quartermaine*, *supra*, were re-affirmed. We have been unable to find any later adjudication by the English courts construing the English Employer's Liability

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Act of 1880, and it would appear as the settled construction by the English courts, that mere "knowledge is not a conclusive defense in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defense is complete." That "plaintiff may recover unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." It is held by some of the English Judges that these principles qualify to some extent the doctrine of "*volenti non fit injuria*," and as thus qualified the rule applies under the Employer's Liability Act.

The principle is clearly laid down by Roberts & Wallace in their work on the "Duty and Liability of Employers," pp. 136, 146, 160, 161, 240; and in Buswell's work on the "Law of Personal Injuries" the same conclusion is reached. §§ 207, 208, 209.

Many of the States have statutory provisions in regard to the duties of employers, but so far as we have been able to ascertain, none of the States have a statute similar to ours except the State of Massachusetts. Section 5 of the Employer's Act of the State of Massachusetts—See Acts 1887, Chapter 270, page 899—is as follows: "An employe, or his legal representative, shall not be entitled, under this act, to any right of compensation or remedy against his employer in any case, when such employe knew of the defect or negligence, which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence." This section omits the provision in our statute, and in the English statute, "unless he was aware that the master or employer, or such superior, already knew of such defect or negligence." But this difference in phraseology is immaterial, as the law, without this provision, would not require the employe to do a useless thing, and the Massachusetts courts do not seem to have regarded the difference as material—holding that their act was "copied, with some variation of detail," "the intention was merely to abridge the model and make it more compact," and "therefore, [says the court] it is proper, if not necessary, to begin by considering how the English act had been construed before our statute was enacted." The court then cites the cases to which we have referred. *Ryalls v. Mechanics' Mills*, 150 Mass. 190. The precise question, which

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we are considering, did not arise in this case. In the case of *Mellor v. Merchants' Manufacturing Co.*, reported in same volume (150 Mass. 362), the rule declared in *Thomas v. Quartermaine*, 18 Q. B. D. 685, and *Yarmouth v. France*, 19 Q. B. D. 654, that the Employers Liability Act did not prevent the proper application of the maxim, *volenti non fit injuria*, was approved. In the subsequent case of *Malcolm v. Fuller*, 152 Mass. 167, a charge was given by the trial court in favor of the defendant, in which the maxim was applied, and though this charge was not open to revision, it is quoted in the opinion, with the statement, "that it was sufficiently favorable to the defendant," citing the case of *Mellor, supra*.

It is very clear, that so far as the authorities, outside of this State, go, the rule declared in the case of *The Eureka Co. v. Bass*, 81 Ala. 200, was not abolished by the Employers Liability Act. Possibly, it was somewhat modified, but as we understand the rule, "*volenti non fit injuria*," as applied in the particular cases cited from the English and Massachusetts courts, there has been in fact no material modification.

A more careful examination of section 2590 of the Code, in connection with the qualifying clause, leads us to the conclusion that our construction of the act, as given in *Holborn Case, supra*, was not the proper one. Without the qualifying clause, it is evident there is nothing in the act which, of itself, would abolish the rule of "*volenti non fit injuria*" as declared in 81 Ala., *supra*. The qualifying clause was not intended to enlarge the rights of the employe, or extend the liability of the employer, or take away the defense of contributory negligence. It is obscure and involved, but its terms would indicate an intention to restrict the employer's liability. It says: "But the master or employer is not liable under this section, *if*," &c. It does not provide for an additional liability under certain conditions; but the employer is not liable, notwithstanding he may have been culpably negligent in failing to discover certain defects, and negligence, "if the servant or employe knew of the defect or negligence, and failed, in a reasonable time, to give information," &c. The reasoning of Bowen, J. on this point, in the case of *Thomas v. Quartermaine*, 18 Q. B. D., *supra*, is convincing.

It would seem that the legislature, by a statutory enactment, recognized the application of the maxim of "*volenti non fit injuria*," as declared by the courts, and out of abundant caution, lest the statute might be construed to give a

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cause of action absolutely when the defects or negligence specified in the statute was the cause of injury, although the risk of such defect and negligence was voluntarily and knowingly assumed by the employe, added the proviso above referred to. The *Case of Holborn*, 84 Ala. 133, was materially modified by the subsequent case of *Highland Ave. and Belt R. R. v. Walters*, 91 Ala. 435. But we are of opinion that the proper construction of the act leaves in force the rule which prevailed before the adoption of the act, and the rule as declared by this court in the case of *The Eureka Co. v. Bass*, 81 Ala., *supra*, and of *Hall v. L. & N. R. R. Co.*, 87 Ala. 717, 720, continues in force under the Employer's Act. So far as the *Holborn Case* and the *Walters' Case* conflict with these conclusions, they are overruled.

It follows that the application for a rehearing must be denied.

Ex parte Farquhar & Son.

Application for Mandamus.

99	375
130	184
130	277

1. *A judge can not dismiss petition for re-hearing.*—The jurisdiction to finally hear and determine a petition for re-hearing, being conferred by statute (Code, § 2876) upon the Circuit Court, and not upon the judge, the judge has no authority to dismiss such a petition.

2. *Amendments to petition relate back to the time of original filing.* The substitution of lost portions of a petition, and the allowance of amendments thereto, when lawfully granted, relate back to the time the original petition was presented, and become parts of that petition, as and of that date.

3. *Suspension of execution necessary pending re-hearing; right of court to grant the same.*—A supersedeas granted on an application for re-hearing having been set aside by the direction of this court, a judge of the Circuit Court, on proper application, should grant another supersedeas, pending the petition for rehearing; suspension of execution of the judgment being necessary.

4. *Demurrers to a petition for re-hearing and rulings on the pleadings and evidence can not be considered on application for mandamus.*—On an application for mandamus, to show cause why a supersedeas granted by a judge of the Circuit Court should not be vacated, and the petition for re-hearing dismissed, this court can not consider the rulings on demurrer to the petition, and on the pleas and evidence in the case.

APPEAL from Circuit Court of Fayette.
Tried before the Hon. S. H. SPROTT.

[Ex parte Farquhar & Son.]

On August 30, 1890, A. B. Farquhar & Son recovered a judgment in an action of trover, against I. and A. I. Seymour and W. S. Metcalf. On the 26th September, 1890, under section 2870 of the Code, the defendants in said trover suit made an application in writing for a re-hearing and for supersedeas of said judgment to the Hon. S. H. Sprott, judge of the 6th judicial circuit. This application was made in vacation. The plaintiffs in the original suit, A. B. Farquhar & Son, appeared before said judge in vacation, in pursuance of a notice of said application, and defended against the granting of the prayer of said petition, by demurrers to the said petition, and by counter affidavits in writing. On October 13th, 1890, the said judge, in vacation, issued an order, endorsed on the back of said application, granting the said defendants a re-hearing in said cause and a supersedeas of said judgment, conditioned upon their filing bond therefor, approved by the clerk of said court, which bond defendants refused to make. The said Farquhar & Son, at once applied to the Supreme Court for a *mandamus* to compel the said judge to vacate the order granting the supersedeas and re-hearing, and to dismiss the petition for re-hearing. On February 12, 1891, this court issued a *mandamus* to said judge commanding him to vacate and set aside said order granting the re-hearing and the supersedeas of the judgment. At the Spring Term, 1891, of said Circuit Court, on motion of said A. B. Farquhar & Son, the said Hon. S. H. Sprott, as judge, made an order vacating and setting aside the supersedeas and re-hearing previously granted, and dismissed said original petition for re-hearing, endorsing the following order thereon: "The within petition is hereby dismissed, and the order heretofore granted on the 13th day of October, 1890, granting a supersedeas and re-hearing is hereby vacated, annulled and set aside. S. H. Sprott, judge presiding." No appeal was ever taken from this last named order. At the same term of said Circuit Court, after the vacation of said former order and dismissal of the petition, the defendants appeared before the court, and moved to amend their original petition and attach additional affidavits thereto in support of their original application, and at the same time again submitted to the court their petition for re-hearing. The court dismissed said petition for re-hearing, refused to entertain defendant's motion to amend their original petition and to substitute their affidavits, and also dismissed the same out of court.

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The defendant thereupon took an appeal to this court from said judgment dismissing said petition and refusing said motion; and this court reversed the same.

At the Spring Term, 1892, of said Circuit Court, after the reversal of said cause, the defendants again renewed their application for re-hearing and also their motion to amend and substitute, submitting the same on the motion to the "court," and moved the "court to hear and determine this motion." The court granted the amendment and substitution, but did not "hear and determine" the application for re-hearing, nor did the court take any other further steps in said case at that term of the said court. Afterwards, on March 28, 1892, defendants filed with the clerk of said court a notice directed to the plaintiffs, (the present petitioners), that on July 16, 1892, an application for re-hearing would be made by them, under sections 2872 and 2873 of the Code, before the Hon. S. H. Sprott at Livingston, Ala.; and on July 11th, said notice and copy of said proposed application was served on present petitioners. On July 16th, at Livingston, before the said judge, in pursuance of said notice, the plaintiffs, the present petitioners, appeared and filed pleas, demurrers, affidavits and counter proofs against said application. They also made a motion to dismiss and quash the petition for re-hearing. On August 15, 1892, the judge overruled the motion to dismiss the petition and the demurrers thereto, granted the relief prayed for, and ordered the clerk to issue a writ of supersedeas restraining the collection of said judgment in said cause.

The present proceeding was commenced by a petition by said A. B. Farquhar & Son, addressed to this court, praying for an alternative writ of *mandamus* commanding the said judge to appear and show cause why he should not be required to vacate and set aside said supersedeas and dismiss said application for a re-hearing; and that on a final hearing of said petition, this court would issue an order vacating the order of the said judge granting the supersedeas and finally dismissing the said petition for rehearing.

MCGUIRE & COLLIER, for petitioner, cited, 50 Ala. 9; *Martin v. Hudson*, 52 Ala. 281; *Ex parte Walker*, 54 Ala. 577; *Ex parte Wallace*, 60 Ala. 267; *Blood v. Beadle*, 65 Ala. 103; *Ex parte O'Neal*, 72 Ala. 560; *Ex parte Johnson & Scats*, 60 Ala. 430; 3 Brick. Dig. p. 677, § 21; *Seymour v. Farquhar*, 95 Ala. 527; Code, §§ 2872-2876.

[Ex parte Farquhar & Son.]

HEAD, J.—The matter complained of in this application was virtually adjudicated by this court in the case of *Seymour et al. v. Farquhar et al.*, 95 Ala. 527; 10 So. Rep. 650. It was there determined that the Circuit Court, as a court in term time, had authority to order substitution of lost portions of the petition of Seymour and others for a rehearing, under the statute, Code, § 2872, *et seq.*, and to allow amendments of the petition. The original petition was presented to the judge of the Circuit Court within four months after the rendition of the judgment sought to be reheard. The judge acted upon it, and granted an order for a supersedeas, which he had authority to do under the statute. He took a step further, however, which was beyond his jurisdiction or authority, and granted the petitioners a re-hearing. For the manifest reason that the jurisdiction to finally hear and determine the petition, and grant or refuse the rehearing prayed is, by the statute, conferred upon the Circuit Court and not upon the judge, this court, upon *mandamus*, directed that the said action of the judge be vacated and set aside. Accordingly, on March 7th, 1891, Judge Sprott made an order setting aside the order for a supersedeas and rehearing which he had previously granted. He again, however, in the same order, took a further step, which was without his jurisdiction as a judge, and ordered that the petition be dismissed. This order of dismissal is attempted to be made one of the supports of the present petition for *mandamus*. It was manifestly void for want of authority in the judge to make it, and can exert no influence upon this proceeding. He could no more dismiss the petition than he could grant the relief it prayed, which we decided in the former *mandamus* proceeding he could not do. At the following term of the Circuit Court of Fayette County, the court made and entered an order dismissing the petition for re-hearing, and, on appeal to this court, that order was reversed, and the cause was remanded to the Circuit Court for further proceedings. The case, then, was one pending in the Circuit Court for its adjudication. While so pending, the court, at the Spring Term 1892, substituted certain alleged lost portions of the original petition and allowed certain amendments, both of which, we held in *Seymour et al. v. Farquhar et al.*, *supra*, it had power to do. The substitution and allowance of the amendments, being lawfully granted, had relation to the time the original petition was presented to the judge, and became parts of that petition as and of that date.

We observe that in the former proceeding for *mandamus* the mandate of this court to the circuit judge was, inadvertently.

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tently, we doubt not, made broad enough to require that he set aside the order for a supersedeas, as well as the order improperly granting a rehearing; and it was accordingly set aside in obedience to that mandate. This being so, the petitioners for a re-hearing gave notice to the plaintiffs in judgment that they would, on a day named, apply to the judge for an order for a supersedeas. Both parties appeared before the judge on the day named, and the application was, as shown by recital in the judge's entry, regularly continued until August 15th, 1892, when an order for a supersedeas was granted. We do not doubt the authority of the judge in that behalf. Suspension of execution of the judgment was necessary pending the petition for a re-hearing, and the supersedeas previously granted having been set aside by the direction of this court, we see no reason why the judge could not thereafter grant another. But whether such action was authorized or not, it could in no wise affect or impair the jurisdiction which the Circuit Court had acquired of the case made by the petition pending therein for a rehearing.

Much of the argument of petitioner's counsel is addressed to supposed errors of the court in its rulings upon demurrers to the petition for re-hearing, and upon the pleas and evidence in the cause. These are questions which can not arise upon application for *mandamus*. If such errors intervened they could have been corrected on appeal. The petition for rehearing contained sufficient averments, under the statute, to confer upon the court jurisdiction of the subject-matter; and the judgment rendered can not be set aside by *mandamus* for errors intervening upon the trial.

Mandamus denied.

Birmingham Trust & Savings Co. v. Louisiana National Bank.

99	379
112	375
99	379
112	564
99	379
132	244

*Bill in Equity to compel a Transfer of Stock upon the Books
of a Corporation.*

1. *Cashier of bank; notice to him is notice to the corporation.*—Notice received or knowledge acquired by the cashier of a bank, while engaged in the transaction of business, in accordance with the general usage and practice of banking institutions, and within the general apparent line of his duty and authority as cashier, is notice to and knowledge of the bank.

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2. *Dealings with agent; secret instructions and limitations.*—One who deals with an agent or officer of a corporation within the scope of the apparent powers of such agent or officer, is not affected by secret instructions of the corporation to him, or secret limitations, which may have been placed upon the power of such agent.

3. *Transfer of stock as collateral security; notice thereof.*—The power to negotiate loans being expressly conferred by charter upon a Trust & Savings Company, if the cashier of such company, in negotiating a loan for a customer, and in the course of the collection of the proceeds of such loan, acquires knowledge and receives notice of the pledge of shares of the capital stock of such company as collateral security, such knowledge and notice is imputed to the company.

4. *Same.*—The knowledge thus imputed to the company is binding upon and controls it in subsequent transactions with such borrower, though conducted by different officers after the former cashier's death, so long as the shares of stock remain in the hands of the transferee.

5. *Lien of a corporation on the shares of the corporation; subordinate to prior pledge.*—When a cashier of a Trust and Savings Company, in the negotiation of a loan, and the collection of the proceeds thereof, acquires knowledge and notice of the pledge of shares of its capital stock by a stock-holder, such knowledge or notice is imputable to said company, and it can not, under section 1674 of the Code, assert a lien on the shares of stock so pledged for the security of a debt to it, subsequently contracted by said stock-holder.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on January 8, 1892, by the Louisiana National Bank against the Birmingham Trust & Savings Company, and W. C. Ward, as administrator of the estate of John B. Boddie, deceased.

On April 25, 1889, John B. Boddie, a resident of Birmingham, Alabama, borrowed \$25,000, from the Louisiana National Bank, a corporation regularly organized under the National Banking laws, and having its place of residence in New Orleans, Louisiana, and executed his note, payable six months after date, to said Louisiana National Bank, and pledged as collateral security for the payment thereof 300 shares of the capital stock of the Birmingham Trust & Savings Company, a corporation duly organized under the laws of Alabama, and having its place of business in Birmingham, Alabama. The negotiation of this loan was made by and with the assistance of M. G. Hudson, the cashier of the Birmingham Trust & Savings Company, and also with the co-operation of the book-keeper of said company. On the maturity of this note it was renewed by said Boddie, and Hudson, the said cashier, wrote the written part of said note and endorsed in his own hand-writing on the back of said note the pledge of 300 shares of stock, as collateral security. When this note matured Boddie, having sold 50 shares of the pledged stock at a premium, made a payment

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on said note of \$5,000, the proceeds of said sale, and again executed a note to the Louisiana National Bank for \$20,000, with the pledge of the remaining 250 shares of stock endorsed thereon. Before the maturity of this last note, the said Boddie and Hudson, the cashier, and Seixas the broker, through whom the loan was made in New Orleans, died. W. C. Ward was appointed the administrator of the estate of John B. Boddie, deceased, and Hudson was succeeded by J. M. Davidson, as cashier of the Birmingham Trust & Savings Company.

On March 31, 1890, the said John B. Boddie became indebted to the Birmingham Trust & Savings Company for over \$21,000, and as collateral security for the payment of the note executed by him evidencing such indebtedness, Boddie transferred a large number of stocks and bonds in other corporations. At different times subsequent to this date, said Boddie contracted additional indebtedness to said Trust and Savings Company, and to secure each debt thus contracted, transferred stocks and bonds as aforesaid. The note for \$20,000, executed by said Boddie to the Louisiana National Bank, not being paid at maturity, the said bank demanded of the Birmingham Trust & Savings Company that a transfer be made on its books of that part of its capital stock which had been previously pledged to said bank by said John B. Boddie. This demand was refused, the said Trust & Savings Company claiming that the said Boddie was indebted to it, and to secure such indebtedness claimed a lien on the capital stock so pledged to the Louisiana National Bank. Thereupon the present bill was filed, in which the complainant alleged the facts stated above, and prayed that the Birmingham Trust & Savings Company be compelled to enter on its books a transfer of the stock pledged to said bank by said Boddie; that the claim and lien of complainant by reason of such transfer be decreed to be superior to the lien set up by the Trust & Savings Company, and that a reference be had before the register to state an account of the amount due the complainant by the estate of John B. Boddie, and that the amount so found be decreed to be a prior lien on the stock so pledged.

The defendants in their answer, and by the evidence introduced in their behalf, set up the defense that, under section 1674 of the Code, the Birmingham Trust & Savings Company had a lien on the stock pledged to the Louisiana National Bank, by reason of the indebtedness of Boddie to said Trust & Savings Company, and that it had no notice of the transfer of said stock to the Louisiana National Bank;

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that although Hudson, as cashier, may have had notice of the transfer, as alleged in the bill, it was in his individual capacity, and had never been communicated to the officers of the said Birmingham Trust & Savings Company, nor was it known to the cashier who succeeded Hudson. Such other facts as are necessary to a full understanding of the decision in this case, are sufficiently stated in the opinion.

On the final submission of the cause, the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered a reference accordingly. The respondent, the Birmingham Trust & Savings Company, now brings this appeal, and assigns this decree of the chancellor as error.

GILLESPY & SMYER, and HEWITT, WALKER & PORTER, for appellant.—A knowledge by Hudson of the transfer of the stock was not notice to the Trust & Savings Company. He being the agent, notice to bind his principal must have been acquired while he was actually engaged in the transaction of his duties as such agent.—*Goodbar, White & Co. v. Daniel*, 88 Ala. 590; *Wheeler v. McGuire*, 86 Ala. 406; *McCormick & Richardson v. Joseph & Anderson*, 83 Ala. 401; *Frenkel v. Hudson*, 82 Ala. 162; *Reid v. Bank of Mobile*, 70 Ala. 199; *Whelan v. McCrary*, 64 Ala. 329; *Hinton v. Insurance Co.*, 63 Ala. 488; *Pepper & Co. v. George*, 51 Ala. 190; *Mundine v. Pitts' Admr.*, 14 Ala. 84; *Terrell v. Bank*, 12 Ala. 502; *Lucas v. Bank*, 2 Stewart, 321. The burden is upon the Louisiana National Bank to show that Hudson, in his official capacity, acquired knowledge of the unrecorded pledge.—*Barker v. Bell*, 37 Ala. 354; *Hightower v. Rigsby*, 56 Ala. 126; *Lambert v. Newman*, 56 Ala. 623; *Wynn v. Rosette*, 66 Ala. 517; *Gilman v. R. R. Co.*, 72 Ala. 566; *Barton v. Barton*, 75 Ala. 400; *Stickney v. Adler*, 91 Ala. 198. Under section 1674 of the Code, the lien of the Trust & Savings Company attached *eo instanti* with the creation of the debt to it by Boddie, and the statute is itself notice to the world that there was a lien in favor of the corporation, immediately upon the contraction of such debt.—*Colt v. Barnes*, 64 Ala. 108; *Dallas Co. v. Timberlake*, 54 Ala. 410; *Ex parte Barnes*, 84 Ala. 540; *Jones on Liens*, § 379; *Morton & Bliss v. N. O. & S. Ry. Co.*, 79 Ala. 617; *A. G. S. R. R. Co. v. S. & N. R. R. Co.*, 84 Ala. 582; *Morgan v. United States*, 28 L. C. P. Co. (U. S.) 1050; *Insur. Co. v. Cullom*, 49 Ala. 558. The knowledge of the pledge by Hudson was not pertinent to any transaction in which he was representing the Trust & Savings Company, and it was not, therefore, his duty to communicate his knowledge of such pledge, and hence his knowledge was no notice

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to the Trust & Savings Co.—*Terrell v. Branch Bank*, 12 Ala. 505; *Angel & Ames on Corporations*, § 305; *Mundine v. Pitts*, 14 Ala. 90; *Frenkel v. Hudson*, 82 Ala. 162; *Farmers & Citizens Bank v. Payne*, 25 Conn. 444; s. c., 68 Amer. Dec., 362; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Congar v. Chicago R. R. Co.*, 24 Wis. 160; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 161; *Second National Bank v. Curren*, 36 Iowa, 559; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; *Bracken v. Miller*, 4 W. & S. (Pa.) 192; *Lawrence v. Tucker*, 7 Greenleaf, (Me.) 195; *Winchester v. Railroad*, 4 Md. 231; *Ewell's Evans on Agency*, pp. 229, 230, 231; *Morse on Banks & Banking*, (3d Ed.) § 104; *Bank of U. S. v. Davis*, 2 Hill, (N. Y.) 451; *Kent's Commentaries*, Vol. 2, p. 836 (note); *Fairfield Savings Bank v. Charl*, 39 Amer. Rep. 320; *Story on Agency*, (Bennett's Ed.), § 140.

W. R. HOUGHTON, *contra*.—The cashier of a bank has authority to bind it in consummating a transfer of its stock. *Cecil National Bank v. Watsontown Bank*, 15 Otto 217. See notes to same case book 56, L. C. P. Co., p. 1039, *Everett v. United States*, 6 Port. 166; *Br. Bank at Huntsville v. Steele*, 10 Ala. 915; *Reid v. Bank of Mobile*, 70 Ala. 199-211; 1 Am. & Eng. Encyc. of Law, p. 421; 1 *Morse on Bank*, § 104; *Ib.* § 166; 1 *Morawetz on Corp.*, § 540 b; *Ib.* 540 c; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286-293. The fact that Hudson actually participated in pledging the stock, his knowledge and notice thereof, was a knowledge and notice to the Trust & Savings Company, and this knowledge could not be affected by the fact that Hudson died.—*Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140; 1 *Morawetz, Corp.*, § 540 b. The Trust & Savings Co. can not repudiate the act of its cashier, after having acted within the apparent authority invested in him.—*Young & Son v. Lehman, Durr & Co.*, 63 Ala. 519; *Carter, Dunbar & Co. v. Lehman, Durr & Co.*, 90 Ala. 126.

STONE, C. J.—The controlling, if not the sole inquiry in this case is, whether the Birmingham Trust & Savings Company, has a lien on the shares of its capital stock, the subject-matter of controversy, to secure the payment of the debts contracted with it by Boddie, the original holder and owner of the stock. The certificates were issued to him, and he remains registered as owner and holder on the books of the company. The question is, will the asserted lien prevail over his prior pledge of the stock to the appellee, to

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secure the payment of a debt contracted on the faith of the pledge?

The common law regards shares of stock in private corporations as personal property, capable of alienation or descent in any of the modes by which that species of property may be transferred. Thus regarding such shares, a lien or equity in favor of the corporation to charge them with a debt due from the shareholder, would not be implied. Where the rights of third persons, accruing by purchase, or pledge from the shareholders, accrue, the recognition of such lien or equity would find no sanction in the rules of the common law. It discountenances all secret liens or trusts, as tending to fraud, to the embarrassment of trade, and to insecurity in the safe and speedy transfer of property.—1 Jones on Liens, § 375; Ang. & Ames Corporations, § 355; Cook on Stockholders, § 521. There is, however, much of equity and justice in such a lien, growing out of the relations which exist between the corporation and its shareholders, and it has become a general legislative policy to confer it either by a general law, applicable to all corporations, or by a provision in the charters of particular corporations. As between the shareholder and the corporation, and all others than *bona fide* purchasers without notice, a by-law or rule of the corporation may very naturally and reasonably create such lien. This proposition is supported by the weight of judicial authority.—Cook on Stockholders, § 552; *Cunningham v. Ala. Life Ins. & Trust Co.*, 4 Ala. 652.

The statutes declare, "Shares or interests in the stock of private corporations are personal property, transferable on the books of the corporation in such manner as is required by the by-laws or by the rules and regulations of the corporation." It is made the duty of every private corporation to require transfers of its stock to be made or registered on its books. And all transfers, hypothecations, mortgages, or other liens, of and on the stock, if not so made or registered, are invalid as to *bona fide* creditors, or subsequent purchasers without notice. The stock is the subject of levy and sale under attachment or execution, as is other personal property; and on the stock, the corporation has a lien for any debt or liability incurred to it by the shareholder, before notice of a transfer, or of a levy thereon. (Code, §§ 1669-74).

So far as the statute declares the shares personal property, it is simply affirmative of the common law.—Ang. & Ames Corporations, § 557. The requirement that a transfer of them must be made or registered on the books of the

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corporation, does not prohibit a transfer in other modes, or render a transfer otherwise made absolutely invalid. It is invalid only as to the particular parties mentioned in the statute. A transfer not made or registered on the books of the corporation may not pass the legal title. But it is not intended to establish a rule applicable only to this particular species of property, prohibiting the creation therein of equities binding the legal title, or requiring that at all times, the legal and equitable title must be united in the same person. When such equities are created, the corporation is bound to regard them from the time it receives notice of their existence.—*Duke v. Cahawba Navigation Co.*, 10 Ala. 82; *P. & M. Mutual Ins. Co. v. Selma Savings Bank*, 63 Ala. 585; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351; *Union National Bank v. Hartwell*, 84 Ala. 379; *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544. It is the protection of *bona fide* creditors, and of subsequent purchasers, the statute contemplates; and the protection of these, only in the event there is want of notice of a prior transfer, hypothecation, mortgage or lien.

The lien which the corporation can assert and enforce against a prior transfer of the stock, though the transfer may create only an equity, binds the legal title of the shareholder, by the very terms of the statute. Like the protection extended to *bona fide* creditors, or subsequent purchasers, it is dependent on a want of notice of the transfer, if the debts or liabilities were incurred by the shareholder. The lien being created by statute, is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute. If there is a levy on the stock, or a transfer of it, subsequent to the incurring of a debt or liability to the corporation by the shareholder, the levy or transfer is subordinate to the corporation's lien. But if the debt or liability does not precede the levy or transfer, the lien is subordinate, and must yield, unless the corporation dealt with the shareholder without knowledge or notice. Having knowledge or notice, in fair dealing, the corporation could not extend credit to the shareholder, relying upon the lien to displace whatever of right the levy or transfer may have conferred.

The pledge to the appellee preceded in point of time the extension of credit to Boddie, and the creation of the debts for the security and payment of which the Trust & Savings Company now attempts to assert a statutory lien on the stock. The material inquiry is, therefore, whether the com-

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pany at and prior to the creation of the debt, is chargeable with notice of the pledge. The fact is undisputed, that Hudson, the cashier of the Company, at the time of the pledge, had knowledge and notice of it, and was in fact, an active participator and agent in the creation of the debt it was intended to secure. And the fact is undisputed, that all the correspondence and intercourse the appellee had with him, were had in his official capacity and relation as cashier, and was not had with him in his private, individual capacity. Nor can it be disputed, that the correspondence, intercourse and dealing were in accordance with the general usage, practice, and course of business of banking institutions, and within the general apparent line of duty and authority of the cashier of such institution. He is the executive officer, held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions; and his acts and dealings within the scope of such usage, practice, and course of business, bind the corporation in favor of those dealing with him, not having other knowledge. Notice received, or knowledge acquired by him, while engaged in the transaction of business according to such usage and practice, is substantially notice to, and the knowledge of the corporation.—*Everett v. U. S. Bank*, 6 Port. 166; *Br. Bank v. Steele*, 10 Ala. 915; *Merchant's Bank v. State Bank*, 10 Wall. 650; *Case v. Bank*, 100 U. S. 454. The general rule, applicable alike to individuals and to corporations, is that the knowledge acquired, or the notice received by an agent, which will affect and bind the principal, must have been acquired or received by the agent doing some act within the line of his duty and authority. Whether as between Boddie and the Trust Company, the transaction in which Hudson was engaged, was the negotiation of the loan from the appellee to Boddie, or the collection for Boddie of the proceeds of the loan, is not material. It may or may not be within the usual scope of the business of a banking institution, to negotiate loans. The negotiation of loans is, however, a function and power expressly conferred by the charter on the Trust & Savings Company. The power existing, the negotiation becomes business of the company, which may be transacted as other ordinary business is transacted. It falls within the line of duty and authority entrusted to the cashier, as the executive officer to whom the management and transaction of the ordinary business of the company is intrusted.—1 *Morawetz Corp.*, § 359, *et seq.*; 2 *Amer. & Eng. Encyc. of Law*, 118. There is no other officer of whom the public at large would

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so readily expect the exercise of such function and power; no other with whom it would so confidently deal in reference to its exercise. Whether there was a by-law, or a resolution of the board of directors, expressly imposing the duty, or delegating the authority, in the absence of knowledge or notice thereof, is not a matter of importance, when the rights and dealings of third persons are involved. Whoever deals with an agent, or officer of a corporation within the scope of the apparent powers of such agent or officer, is not affected by the secret instructions of the corporation, or the secret limitations, which may have been placed upon his power.—2 Morawetz Corp., § 593, *et seq.* Nor is it important whether it be true, or not true, that in no other instance than this, did Hudson ever negotiate a loan. If the negotiation of loans was within the scope of his authority and duty as cashier under the usages, practice and course of business of banking institutions, it was the right of the appellee to rely on this apparent authority in dealing with him in his official capacity.

If in his capacity of cashier Hudson negotiated, or aided in negotiating the loan for Boddie, and in the course of the negotiations acquired knowledge and received notice of the pledge, that knowledge was also acquired, and the notice also received, in the course of the collection for Boddie of the proceeds of the loan, and it can not be doubted that in making the collection he acted wholly for the company, and within the line of his duty and authority. There are but few functions of a banking institution more frequently exercised, than that of making collections, especially at places distant from the locality of the bank. The collection, of necessity, is made through the medium of correspondence, and the conduct of its correspondence is surely, according to the usages and practice of banking institutions, within the line of the duty and authority of the cashier. The loan having been negotiated, a pledge of three hundred shares of the capital stock of the Trust & Savings Company was the required security for its repayment. Hudson attested the transfer of the certificates of stock, and they were forwarded to the appellee in an envelope bearing the stamp of the company. At the same time, the Trust Company, through Hudson, its cashier, drew upon Seixas, the broker in New Orleans, for \$24,162.50, the net proceeds of the loan, remitting the draft to the appellee for collection, with instructions to collect and deposit to the credit of the company in the Whitney National Bank of New Orleans. The collection and deposit were made, of which the company

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were promptly informed. On the same day, the certificates of stock were forwarded to the appellee, the draft was drawn, and Boddie was credited with the draft and debited on the books of the company with charges on account thereof—\$62.50. Whatever may have been the knowledge acquired, or the notice previously received by Hudson in this particular transaction, by the collection from Seixas of the proceeds of the loan, he acquired full knowledge, and received full, actual notice of the pledge of the stock to the appellee. That knowledge and notice were the knowledge of and notice to the company. The collection of the money for Boddie was ordinary business of the company, and such business, according to the usage and practice of banking institutions, is transacted by and through the cashier. It is only through its officers and agents that a corporation acquires knowledge, or receives notice; and though knowledge acquired, or notice received by an officer or agent, while not engaged in transacting the business of the corporation, may not affect or be imputed to it, yet, if it is acquired or received while engaged in the sphere of his official duty and authority, the knowledge or notice becomes the knowledge of and notice to the corporation. Otherwise, knowledge and notice could never be traced to the corporation, and the utmost insecurity in dealing with it would follow. As against corporations, there are peculiar and urgent reasons for a stringent enforcement of the general rule, that knowledge acquired, or notice received by an officer or agent, within the scope of the agency, is deemed notice to the principal; as "the corporation can not see or know any thing except by the intelligence of its officers."—*Bank of Pittsburg v. Whitehead*, 36 Am. Dec. 186, notes.

It is insisted that although Hudson, in his relation and capacity of cashier, acquired knowledge and received notice of the pledge, the knowledge and notice is not imputable to the company to affect such transactions had with Boddie, which were conducted by other officers and agents subsequent to Hudson's death, and who were without such knowledge or notice. This insistence is founded in a misapprehension of the principles of law, and of its true theory. The knowledge and notice an agent acquires and receives in the transaction of the business of the principal, is not personal, pertaining to the agent only. The legal principle is thus tersely expressed: "Notice to an agent is notice to the principal."—*Wade on Notice*, § 672. And the theory of the principle is, that if the principal had in person transacted the business, he would have acquired the knowledge,

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or received the notice the agent acquires and receives, and, therefore, is chargeable with such knowledge and notice.—*Sooy v. State*, 41 N. J. Law 400. And upon general principles of public policy, it is and must be presumed, that the agent communicates to the principal the facts of which he acquires knowledge or notice. If the communication is not made, it is the fault or neglect of the agent, which must be visited on the principal, rather than upon strangers dealing with the agent, within the scope of the agency.—*Story on Agency*, § 140. The Trust & Savings Company being chargeable with knowledge and notice of the prior pledge to the appellee, is not entitled to assert a lien on the stock for the security of the debts subsequently contracted by Boddie.

We find no error in the record, and the decree of the chancellor is affirmed.

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Action against Railroad Company as Common Carrier.

1. *Action against foreign railroad company; when properly brought in this State.*—A contract of affreightment with a foreign railroad company, operating a line of its railway in Alabama, by a resident of this State, for the transportation of freight from his place of residence to another State, is an Alabama contract, and an action for its breach can be brought here.

2. *Action for breach of contract of affreightment; burden of proof.*—If, in an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, it is shown that the defendant failed to deliver such stock in a safe condition, within a reasonable time, a presumption of negligence arises, and the *onus* is upon the defendant to excuse itself from negligence.

3. *Same; measure of damages.*—In an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, the measure of damages is the difference in the market value of said stock at the place of consignment, if they had been delivered without any delay, and their market value after their delivery at such place, in the condition they were shown to be by the evidence.

4. *Charge to the jury; does not assume negligence.*—An instruction to the jury that, if a carrier, having undertaken to deliver live stock, failed to deliver it in a safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof is shifted to the defendant to excuse itself from negligence, is not erroneous, as assuming that the stock was shipped in a safe condition, and injured during transportation.

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5. *Same.*—In an action against a common carrier for injury to live stock, alleged to have been caused by unreasonable delay in transporting the same, an instruction that, if the jury believe from the evidence the plaintiff is entitled to recover, the measure of damage is the difference in the market value of the stock, if they had been delivered without delay, and their market value after their delivery, in the condition the evidence shows they were in, is not erroneous as assuming that the stock was injured in transportation.

6. *Common carrier; liability for all damage referrible to negligent delay in transportation.*—A common carrier, guilty of negligent delay in the transportation of live stock, is liable for all damages resulting from the effect of such delay upon the physical condition of the stock, or from their viciousness aroused by the unnecessary confinement incident thereto.

7. *Charge to the jury; nominal damages.*—In an action for damages caused by negligent delay in transporting freight, a charge to the jury that seeks to limit the plaintiff's recovery to nominal damages, on the theory that by ordinary prudence the injury complained of could have been repaired, is affirmatively bad, if, for aught that is hypothesized in said charge, the plaintiff might have been put to great trouble and expense in repairing the injury to his property caused by defendant's negligence.

8. *Same; not disregarding testimony.*—In an action for injury to live stock, caused by delay in transporting the same, an instruction "that the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of the same to the railroad company, is ten or twelve hours," is not open to the objection that it disregards the testimony adduced in the case, that "usually stock in shipping go through very nicely in ten, fifteen or twenty hours;" the tendency of this evidence being merely to show that the stock would not be injured on a journey lasting from ten to twenty hours.

9. *Evidence of custom; when not relevant.*—In an action against a common carrier for injury to stock caused by delay in transporting them, evidence as to "what was the custom in such cases as to some one going along with the stock," is irrelevant.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JOHN B. TALLY.

This was an action brought by the appellee, a corporation, against the appellant, a foreign corporation; and sought to recover damages for the failure to deliver within a reasonable time certain live stock, and for injury to such live stock, which were delivered by the plaintiff to the defendant, as a common carrier, to be transported from Birmingham, Alabama, to Atlanta, Georgia.

This suit was commenced on January 1, 1890, and the summons and complaint were served on January 16, 1891, by leaving a copy thereof "with C. P. Hammond, superintendent of the Richmond & Danville Railroad Company, the defendant." On March 17, 1891, the defendant demurred to the complaint on the grounds, *first*, that it shows that the plaintiff is a corporation, and fails to aver whether the plaintiff is a domestic or foreign corporation; and *second*,

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because it fails to show that the plaintiff is authorized by its charter to make and enter into a contract of carriage of live stock, which is the foundation of this suit. This demurrer being overruled by the court, the defendant, on February 1, 1892, interposed a special plea to the cause of action, on the ground that the court had no jurisdiction to hear and determine the case, because the defendant "is a foreign corporation incorporated under the laws of the State of Virginia; that the contract of delivery of the horses and mules, described in the complaint, was made in Alabama, to be partly performed in Alabama and partly in Georgia; and that the said contract was to be consummated in the State of Georgia by delivery within a reasonable time of said horses and mules at Atlanta, in the State of Georgia." Plaintiff moved the court to strike said special plea to the jurisdiction of the court from the file on the following grounds: 1st. Because the said plea was not interposed at the first term of the court after the bringing of said suit; 2d, because it is shown by the indorsement of the clerk that the said plea was not filed within the time allowed for pleading, and comes to late; and 3d, because the defendant, by filing its demurrer to the complaint, submitted to the jurisdiction of the court. The court granted this motion to strike the special plea from the file, to which ruling defendant duly excepted; and issue was then joined on the pleas of the general issue and contributory negligence. The facts of the case, as shown by the bill of exceptions, are sufficiently stated in the opinion.

One A. J. Camp was introduced as a witness for the plaintiff, and after he had testified that at the time the bill of lading, which was signed by him, was given to the plaintiff, he was the agent of the defendant in Birmingham, the defendant's counsel asked him the following question: "What was the custom in such cases as to some one going along with the stock?" The plaintiff objected to this question as being irrelevant, which objection was sustained by the court, and the defendant duly excepted to this ruling. There were several other exceptions reserved to the rulings of the court upon the evidence, but the opinion renders it unnecessary to notice them in detail.

Among the written charges requested by the plaintiff was the following: (6.) "The jury are charged that the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of same to the railroad is ten or twelve hours, and if their being kept on the car for a longer time by the defendant caused them to be vicious and to in-

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jure one another, the defendant is liable to answer in damage for such injury." The defendant duly excepted to the giving of this charge. The defendant then requested the court to give, among others, the following written charges, and separately excepted to the refusal to give each of them :

(1.) "The common law rule was that a common carrier was an insurer of goods entrusted to it for carriage; and that if such goods were lost, destroyed or injured, the burden of proof was on the carrier in an action for the damages to acquit itself of negligence, or to show that the loss or injury was caused by the act of God, or the public enemy; but that rule does not apply in this case, because the articles are live stock, which by their nature, are susceptible to injury during the transportation; and in such a case the common carrier is not liable, except for actual negligence causing or contributing to the injury complained of; which negligence must be shown by actual proof in the case."

(4.) "If the jury believe from the evidence that the only injury sustained by the animals was such as animals usually sustain when undergoing transportation on railroads, they can find only nominal damages, that is to say some small amount, as one dollar, or one cent." (12.) "The burden of proof is on the plaintiff to show that its animals were injured through the defendant's negligence, and this burden is not shifted by proof that the defendant failed to deliver them within a reasonable time and that they were in an injured condition, because, by their very nature, such animals are liable to injury during transportation in a railroad car." (16.) "The measure of damages in this case is not the difference between the market value in Atlanta of the animals, immediately upon their arrival there, and their probable market value had they promptly arrived there, without injury. It is the duty of every person who has sustained injury to his property to use every reasonable effort to repair the injury; and the jury should consider whether or not the plaintiff could reasonably have repaired the injury to his stock after their arrival in Atlanta, by such remedies as due skill would have suggested to a man of ordinary prudence in his situation; and if you find from the evidence that by the due use of such skill such injury could have been repaired, and the market value of the animals thereby become restored, your verdict can not be for more than nominal damages."

There was judgment for plaintiff, and defendant appeals, and assigns as error the several rulings of the trial court

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upon the pleadings, evidence and on the charges given and refused.

JAMES WEATHERLY, for appellant.—(1.) The motion to strike the defendant's special plea from the file was improperly sustained.—*Railroad Co. v. Carr*, 76 Ala. 388; *Railroad Co. v. Chumley*, 92 Ala. 317; 12 Amer. & Eng. Encyc. of Law, 305; subdiv. C. (2.) The charge of the court as to the burden of proof was erroneous.—3 Amer. & Eng. Encyc. of Law, p. 16, title, Carriers of Live Stock, and authorities cited in note 3; *Saragossa*, 3d Woods C. C. Rep. 380. (3.) The charges requested by the defendant should have been given.—*Railroad Co. v. Henlein*, 52 Ala. 606; *Railroad Co. v. Harwell*, 91 Ala. 342; 3 Amer. & Eng. Encyc. of Law, pp. 2, 6, note 3.

GREGG & THORNTON, *contra*.—(1.) Plea to the jurisdiction of the court should have been filed at the first term of the court after the suit was brought.—*Beck v. Glenn*, 69 Ala. 121; 12 Rule of practice in Circuit Court, Code of Ala. p. 808. (2.) The court had jurisdiction of the cause of action, and the suit was properly brought in this State.—*A. G. S. R. R. Co. v. Thomas*, 89 Ala. 294, 303. (3.) The question asked the witness Camp called for irrelevant evidence.—*S. & N. R. R. Co. v. Henlein*, 52 Ala. 606; *E. Tenn. Va. & Ga. R. R. Co. v. Johnson*, 75 Ala. 696. (4.) The charges given by the court were without error.—*S. & N. R. R. Co. v. Henlein*, 52 Ala. 606; *East Tenn. Va. & Ga. R. R. Co. v. Johnson*, 75 Ala. 596; *A. G. S. R. R. Co. v. Little*, 71 Ala. 611. (5.) The court properly refused to give charge number 4 asked by the defendant.—*S. & N. R. R. Co. v. Wood*, 71 Ala. 215; *Alexander v. Alexander*, 71 Ala. 295; 3 Brick. Dig. p. 113, §§ 106, 109.

McCLELLAN, J.—This action is prosecuted by Trousdale & Sons, a domestic corporation, against the Richmond & Danville Railroad Company, a foreign corporation. It sounds in damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock from Birmingham, Alabama, to Atlanta, Georgia, and there deliver them to the plaintiff which was both consignor and consignee. The contract was made in Birmingham, Alabama, where the plaintiff was domiciled and where the defendant was present by its agents, and whence it operated a line of railway to Atlanta, Georgia, great part of which was in

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Alabama, and over which the transportation was to be effected. This was, therefore, an Alabama contract, not only made here, but in part to be performed here; and the courts of this State clearly, we think, have jurisdiction, service being had, of this action for its breach, notwithstanding the defendant is a foreign corporation, and its full discharge was to be consummated by delivery to the consignee in another State. See *Central Railroad & Banking Company of Georgia v. Carr*, 76 Ala. 388, s. c. 52 Am. Rep. 339.

The evidence tended to show that the animals when delivered in Atlanta, from thirty-four to thirty-six hours after they should have been delivered—a reasonable time for transportation and delivery being put at from ten to twelve hours, and the time required in this instance at forty-six hours—"had been down and were skinned up," that they "looked very thin, hollow, skinned and scalded from standing in the car," "seemed to be feverish," "one lame in hind legs and limping," one specially valuable horse "was sore and lame and appeared to have no life," twelve others "all sore and lame and skinned," &c., &c.; that all the stock were in excellent condition when shipped from Birmingham, and that the bad condition in which they were on arrival at Atlanta was due to the fact that they were kept on the cars a very much longer time than was necessary for their transportation and delivery, without water or food. On the other hand there was evidence tending to show that the animals, or some of them, were not in a sound condition when they were received for shipment, and that the diseases and hurts they exhibited on delivery in Atlanta existed, or had been sustained, before they were shipped and did not result from their transportation at all. It is insisted that the trial court assumed or declared the falsity of the evidence last referred to, or that in effect it was withdrawn from the consideration of the jury by the instructions given. We think not. The charges supposed to have this infirmity are as follows: "If the defendant, having undertaken to deliver the stock, failed to deliver it in a safe condition, within a reasonable time, the presumption of negligence arises, and the burden of proof is shifted to the defendant, to excuse itself from negligence;" and again: "If the jury believe from the evidence that the plaintiff is entitled to recover, the measure of the damage is the difference in the market value of the stock in Atlanta, Ga., if they had been delivered without any delay in shipment or delivery, and their market value after their delivery in Atlanta, Ga., in the condition the evidence shows

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they were in." The first charge quoted we understand to mean only this: that if there has been unreasonable delay on the part of the defendant in the transportation and delivery of the live stock and when, after such unreasonable delay, they are found to be in an unsound condition, the *onus* is then on the defendant to show that the unsound condition of the stock was not due to the unreasonable delay in transportation; or, in other words, that evidence of unreasonable delay and the existence of injuries on delivery raises a *prima facie* presumption that the delay was negligent and the injuries resulted from it, and puts it on the defendant to rebut this presumption, and show either that there was no negligent delay, (which was not attempted to be shown in this case) or, conceding the delay, that the injuries did not result from it, but (as was attempted to be done in this case) that the stock was in an unsound condition—had received the injuries complained of—before the shipment. This we understand to be the law, especially where, as in this case, the contract of affreightment sets forth that the stock when received was "in outward apparent good order," and the injuries counted on and shown in the testimony were "outward and apparent." This charge does not assume that the defendant has not discharged this burden, nor does it take away from the jury, or tend to mislead them to forego, the right to find on the whole evidence that the stock was unsound when it came to the hands of the carrier. And so with the other charge quoted which was given at the request of the plaintiff. It does not assume that the stock was injured in the transportation, but asserts only that, if the jury should find negligent delay—as to which there was no controversy—in the transportation and delivery, the measure of plaintiff's recovery would be the difference in value of the animals at the time they should have been delivered in the condition they would have been at that time, and their value when they were delivered in the condition they were at that time. This did not tend to prevent the jury to find that their injuries were not caused by the delay but existed before the carriage began, and hence that their condition was the same when they were delivered as when they should have been delivered. The instruction in effect was that, if the jury found any damages at all for plaintiff, it should be measured by the change in the condition of the live stock wrought by the unreasonable delay, if such change had been wrought.

It may be true that railroad transportation of live stock always and inevitably involves reduction in their weight,

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some lameness and even abnormal weakness; but that this is true and that these effects, incident to the nature of the subject-matter and the manner of transportation, can not be made the basis of a recovery in damages where there has been no negligence on the part of the carrier contributing thereto or aggravating the natural injuries resulting from car wear and necessary deprivation of water and food, is not to say that, where the carrier has been guilty of negligence and subjected the stock to the injurious effects of such transportation for an unreasonable and unnecessary length of time, and in consequence thereof the stock has been injured, though only in this natural way, to a greater extent than would have been the case had the delay not occurred, the carrier would not be responsible for whatever increased damage the stock has sustained on account of the delay, though such damage may be purely incident to keeping the animals on the car. To the contrary, we do not doubt the liability of the carrier for all damage that is referrible to a negligent prolongation of the transportation through its natural effect upon the physical condition or latent vicious propensities of the animals, whereby they are reduced in weight or strength more than they would have been had prompt carriage and delivery been made, and injure each other in consequence of viciousness, aroused by the excess of their confinement beyond the time necessary for transportation and delivery. These views will suffice to show the grounds of our opinion, that the trial court did not err in its rulings on charges having reference to this part of the case. The charges asked by the defendant were faulty in that they involved a tendency to mislead the jury, if indeed that was not their direct effect, from a consideration of any injuries which resulted to the stock from their nature, habits and propensities *in connection with and as operated upon* by the negligent delay of the carrier. Charge 6 given for plaintiff correctly asserted the law in this connection. Charges 1, 12 and 4 refused to defendant were open to the objection pointed out above, if not to others also.

Charge 16 asked by defendant is in a sense abstract—there was no evidence that plaintiff was remiss in its efforts to repair the injuries sustained by the stock, if any, or that such injuries might have been lessened or cured by proper attention which was not given—and was affirmatively bad in that it limits the recovery to nominal damages, though, for aught that is hypothesized, the plaintiff might well have been put to great trouble and expense in repairing the in-

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jury which his property had sustained through defendant's negligence.

Charge 6 above referred to is not open to the objection urged in argument which proceeds on the idea that there was evidence that twenty-hours, or any number beyond ten or twelve, would be a reasonable time for the transportation from Birmingham to Atlanta. A witness for plaintiff testified that "usually stock in shipping go through very nicely in ten, fifteen or twenty hours," but this evidence went to show that stock would not be injured on a journey lasting from ten to twenty hours on cars, and not that it was reasonably necessary for any length of time beyond ten or twelve hours to be consumed in the transportation from Birmingham to Atlanta.

We cannot see that the court committed any error in sustaining plaintiff's objection to the question put by defendant to the witness Camp. The form of the question was enough to support the objection, and besides the fact sought to be elicited was not relevant. If there was a custom for shippers of stock to accompany it, *non constat* but that this was a mere privilege and not a duty of the shipper; and if the duty of the shipper in this instance, it does not appear that its performance would have avoided the injury, or that its remission contributed thereto.

The other exceptions to rulings on testimony are not urged in argument.

The judgment of the Circuit Court is affirmed.

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Action for Damages against a Railroad Company for Personal Injuries.

1. *Gross carelessness, wantonness or recklessness.*—In an action against a railroad company for damages, on account of personal injuries, where it is shown that the accident was within the corporate limits of a town or city, but not at a public crossing, or under such conditions as that defendant was chargeable with notice, in the absence of proof of actual notice, that there were persons on the track at the place where the accident occurred, or a knowledge that injury would result as the probable consequences of any mere neglect of duty, no recovery can be had under a count, which alleges that the injuries were caused by the "gross carelessness, wantonness or recklessness" of the defendant.

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103	138
106	607
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114	499
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126	383
99	397
131	595
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136	595
138	596
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2. *Evidence as to simple negligence.*—Where the evidence is in conflict as to whether the defendant is guilty of simple negligence, it is a question for the jury to determine whether the defendant is guilty of negligence, and then whether the plaintiff is guilty of negligence which proximately contributed to his injury.

3. *Crossing railroad track.*—A person has the right to cross over a railroad track wherever he may have occasion to do so, but before attempting to cross, he must look and listen; and if, after having thus assured himself that the way is clear, while attempting to exercise this right by crossing over the railroad track in a city or town, he is injured by the negligence of the employes of the railroad company, in failing to give the signals of warning required by statute, he is entitled to recover for personal injuries thus sustained.

4. *The plaintiff a trespasser.*—If, in an action against a railroad company for damages for personal injuries, it is shown that at the time of the accident the plaintiff was standing on the track, or walking along the track, he was then a trespasser, and is not entitled to recover, although the defendant may have been guilty of negligence in failing to give warning of approach, or to comply with the rate of speed fixed by law.

5. *"Gross," "reckless," as applied to negligence.*—The words "gross" and "reckless," when applied to negligence, *per se* have no legal significance that imposes other than simple negligence and a want of due care.

6. *Negligence; two grades.*—There are, in our jurisprudence, but two recognized grades of negligence: (1.) Simple negligence, or want of that care which a reasonably prudent man would exercise under like circumstances. (2.) Wilful or wanton negligence, which means such a reckless or wanton disregard of probable consequences, known to the person guilty of the wrong, or under such circumstances as will impute a knowledge to the wrong-doer, or such a negligent omission of preventive effort, after knowledge of danger, as to be the equivalent of wilful and intentional injury.

7. *Charges; abstract.*—A charge announcing a correct principle of law, if not applicable to the facts of the particular case, is properly refused.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

The appellant, E. G. Stringer, brought the present action against the Alabama Mineral Railroad Company and the Louisville & Nashville Railroad Company, and sought to recover for personal injuries sustained by him, in being thrown from the track by an engine, which was running upon the Alabama Mineral Railroad track. The Alabama Mineral Railroad Company was a branch of the Louisville & Nashville Railroad Company's system. The accident occurred in the city of Talladega, on Coffee Street. The city had authorized the construction by the railroad company of its track upon said street, and there was also the track of the Birmingham & Atlantic Railroad Company on said street. The plaintiff's testimony tended to show that he was engaged in the warehouse business in the city of Talla-

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dega, and there was erected on said Coffee Street, within a few feet of the Alabama Mineral Railroad track, a platform used by him in connection with his business. For the purpose of preventing any injury to said platform by the workmen, who were engaged in laying sewer pipe under said platform, the plaintiff had been under said platform near the railroad track, where the pipe was being laid. As he came out from under the platform, a steam drill, used in connection with the sewerage work, commenced operations, and threw a cloud of steam across the Alabama Mineral track; that before starting across said track for the purpose of returning to his place of business, he looked to the West and saw no train approaching; in this direction he being able to see only about 40 yards on account of the steam from the drill; that he then looked towards the East, and saw no train; that upon his then taking a few steps up an embankment to go across the track, he was struck by an engine of defendant's coming from the West. The train to which this engine belonged was a freight train, due to arrive in Talladega at 8 o'clock A. M. The passenger train coming from the East was due at 9 o'clock A. M., and the accident occurred at 8:55 A. M.

The testimony for the plaintiff also tended to show that at the time of the accident the engine was running at a rate of speed of from 10 to 20 miles per hour, and that the bell was not being rung, or any signal of its approach given, and that if any such signal had been given he could have heard it, notwithstanding the noise of the steam drill prevented his hearing its approach without such signals. The testimony for the defendant, as to the speed of the engine, was in conflict with that for plaintiff, and tended to show that its speed was from 5 to 8 miles per hour, and that its bell was being rung as it passed along Coffee Street. The place where the accident occurred was not a crossing, but was on a street, which the testimony for the plaintiff tended to show, was very much travelled by persons on foot, and often used by vehicles, and that there was much crossing and re-crossing Coffee Street at this point.

The assignments of error only go to the ruling of the court upon the charges given and refused. Upon the introduction of all the evidence the court in its oral charge, among other things, instructed the jury as follows: "The agents who were running the train, the engineer and fireman, were not bound to keep a lookout for trespassers or persons upon the track at that place." The plaintiff excepted to the giving of this part of the oral charge, and also

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separately excepted to the court's giving each of the following written charges which were requested by the defendants: (1.) "The court charges the jury that there is no evidence in this case, showing that the injuries to the plaintiff were caused by the gross negligence of the defendant or its agents." (2.) "The court charges the jury that there is no evidence in this case to show that the injuries to plaintiff were caused by the defendant, or its agents, wantonly, recklessly, or intentionally." (3.) "The court charges the jury that, although they may find from the evidence that Coffee Street was a public street in the city of Talladega, and was frequently used by travellers on foot, and occasionally used by travellers in vehicles, and that this fact was known to the defendant's engineer and fireman, in charge of the engine at the time plaintiff's injuries were received, still the defendant would not be guilty of gross negligence even though its engineer was running at an undue rate of speed, or faster than required by the ordinance of the city of Talladega, and without giving the statutory signals." (4.) "The mere fact that the defendant's train was being run through Coffee Street in the city of Talladega, over which defendant's track was laid by permission from the city, at a faster rate of speed than required by the ordinances of the city of Talladega, and without giving statutory signals, is not sufficient to show gross negligence on the part of defendants. The undisputed evidence in the case sufficiently shows that at the time the injuries were received, the engineer and fireman in charge of the defendant's train did not and could not see plaintiff on the track, the view of him being obscured by the steam from the steam drill which was operating near the track." (6.) "The court charges the jury, that although the defendant's railroad is constructed through Coffee Street, which is a public street in the city of Talladega, by permission from the city, that plaintiff was trespassing, and unlawfully on said track, if, at the time he was injured, he was standing on the track or walking up the track with his back towards the engine. The undisputed evidence in this case shows that there was sufficient room for plaintiff to walk in the street without walking up defendant's track; that the railroad track is a known place of danger, and it was inexcusable in plaintiff, if he unnecessarily walked up defendant's track returning to his place of business, or if he was standing upon the track looking at the operation of the steam drill, or for whatever purpose. If the evidence in this case shows to your satisfaction that the plaintiff at the time he was injured was walking up the defendant's track with

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his back or side to the approaching engine he was guilty of contributory negligence, and can not recover." (7.) "The court charges the jury that notwithstanding they may believe from the evidence that Coffee Street was a frequently travelled street in the city of Talladega, used frequently by foot passengers, but not by travellers in vehicles, and notwithstanding these facts may have been known to the defendants and their employes, this is not sufficient to charge the defendant with actual notice that there were persons or any person on the track at the time the accident happened. The circumstances of this case are not sufficient to charge defendant with notice, or with what is equivalent to notice, that there were any persons on the track. The fact that the street is frequently used by passengers on foot, which is known to defendant's employees, and that they occasionally cross and recross the track is not equivalent to actual notice, under the circumstances of this case, to defendants or their agents, that there were persons or any person on the track, at the time the accident happened." (8.) "The court charges the jury that if you believe from the evidence that the engine on the defendant's track was being operated at a speed not exceeding eight miles per hour and that the bell was being rung from the time the engine left West street until it passed the platform where the accident happened, your verdict must be for the defendant." (9.) "The court charges the jury that they will consider all the testimony, and will endeavor to arrive at the truth of the matter, as revealed to them from the mouth of the witnesses, or by the physical facts in the case, and by all the circumstances shown by the testimony in the case, and in construing the evidence they must adopt the evidence which seems to them most reasonable, and they must reconcile all the evidence if they can. And if they find it impracticable to do this, positive evidence is regarded in law as of more weight than negative, and ordinarily where the witness testifies that he saw the train or heard the sounds, his testimony is entitled to more weight than the person who stated that he did not see or that he did not hear. If from the testimony the jury are reasonably convinced that the engine was running at a speed not exceeding eight miles per hour and that the bell was being rung from West street, where the engine started, to the platform, where the accident happened, then the verdict must be in favor of the defendant." (10.) "The court charges the jury that even if the jury should find that the defendant or its agents failed to run the engine as prescribed by the ordinance of the city of Talladega, within

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eight miles per hour, and failed to give the statutory signals by ringing the bell and blowing the whistle, while passing through Coffee street, this would be but 'simple negligence' on the part of the defendant, and notwithstanding this, if the plaintiff himself was negligent in entering on the defendant's track, without stopping and looking and listening for the approach of a train, and his negligence contributed proximately to the injuries he received, he can not recover."

(11.) "The court charges the jury that while the law requires of the defendant or its agents reasonable diligence in the operation of its train, it also requires of the plaintiff reasonable diligence for his own protection, and if he entered upon defendant's track at a time when his vision was obscured by the steam from a steam drill, when by walking but a few steps down the track he could have had an unobscured view of the track for two hundred or more yards, which would have insured his safety, then he can not recover." (12.) "The court charges the jury that it is not unreasonable that the plaintiff be required to exercise reasonable diligence for his own protection; every one is bound to know that the track of the railroad company is a known place of danger, and foot passengers, as well as passengers in vehicles, are charged with notice of this fact, and when crossing or attempting to cross a railroad track are required to stop and look and listen for a train before entering upon the track; and if they fail to do so, and receive injuries they can not recover. And if the view of the track is obstructed, or if the noise of the approach of the train is deadened by other noises it is all the more incumbent upon the plaintiff to be careful and see that the crossing is free from danger. If his view is obstructed, and if, as in this case, by taking a few steps the plaintiff can avoid the obstruction or get a clearer view of the track, for such a distance as will insure his safety, he is guilty of such negligence in failing to do so as will preclude his recovery." (13.) "The court charges the jury that the plaintiff had no right to walk up defendant's track, or to stand on the track, and if the evidence in this case shows that at the time the injuries were received the plaintiff was walking up defendant's track returning to his place of business or was standing upon the track noticing or watching the operation of the steam drill, then he can not recover."

The plaintiff requested the court to give the following written charges, and separately excepted to the refusal of the court to give each of them as asked: (1.) "If the jury believe from the evidence that Stringer was injured by the defendant's engine being run against him, and throwing him

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against the timbers of the platform and in the ditch as he was crossing the track, and that just before he went on the track, and when in three or four feet of it, he stopped and looked down, and then turned and looked up, the track, and that there was no engine in sight, and that the drill was making so much noise, that an approaching engine could not be heard, and if they believe from the evidence that he had time to cross and would have crossed the track safely if the engine had been running only 8 miles an hour when it struck him, then the jury must give their verdict for Stringer."

(2.) "To run a train at a high rate of speed, and without signals of approach, at a point where trainmen have reason to believe there are persons in exposed positions on the track, and where the public are accustomed to pass on the track with such frequency and in such numbers (facts known to those in charge of the train) as they will be held to a knowledge of the probable consequences of running at such rate without warnings, will impute to them reckless indifference, and will render their employer liable for injuries resulting from so running said train, and notwithstanding there was negligence on the part of the person injured and no fault on the part of the servants after they saw or ought to have seen him." (3.) "If the jury believe from the evidence that Stringer was injured by being run against by defendant's engine on Coffee street, in the city of Talladega, while passing across or along said street, at a point where the train-men had reason to believe there were persons in exposed positions on the track, and where the public are wont constantly to pass on the track in large numbers, and where there was a public warehouse in use fronting on said street, from and into which freight was loaded and unloaded across the track on which the engine was being run, that such point on Coffee street was in a populous district in the city of Talladega, and at such point there was at that time a large force of hands engaged in putting down a sewer in said street, and that there was a dense cloud of steam across said street which could not be seen through, and that these facts were known to those in charge of said engine, and that such facts were sufficient to give those in charge of the engine reason to believe there were persons in exposed positions on the track, and that when the engine struck Stringer it was running at from 10 to 20 miles an hour, and that the bell was not being rung nor the whistle blown, and that Stringer's injuries were caused by the running of said engine at such rate of speed without warning, then such persons in charge of the engine are held in law to a knowledge of the

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probable consequences of so running without warning so as to impute to them reckless indifference, which renders the defendants liable for Stringer's injuries, and they are liable notwithstanding there was negligence on the part of Stringer in so being on the track and no fault on the part of the engineer and fireman after they saw, or ought to have seen him, and the jury should render a verdict for Stringer." (4.) "When a railroad runs on or along a public street of a large city, which street is in constant use by the citizens and where there is a cotton warehouse which fronts on said street, and into and from which all kinds of freight is constantly being loaded, and on and from cars left standing on another track on the other side from the warehouse of such railroad, and where many people are in the habit of rightfully being in exposed conditions on such track at such place, and where these facts are known to those in charge of an engine running on such track at such place, it is wantonness, recklessness and gross negligence to run such engine at the rate of 15 to 20 miles an hour without ringing the bell or blowing the whistle, and if one of such persons on the track is injured by such running of the engine, he is entitled to recover damages, notwithstanding he may have been guilty of simple negligence by being on such track." (5.) "If the jury believe from the evidence that Stringer was hurt by being run against and thrown under the platform by defendant's engine while he was walking on the track on Coffee street, and that immediately behind Stringer there was a cloud of steam about 15 or 20 feet high and the same width, which could not be seen through, and that the engine ran through the steam at about 12 to 20 miles an hour, and that the bell was not being rung nor the whistle blown, and that the platform was used in connection with Stringer & Jackson's warehouse, and that they were constantly engaged in loading and unloading freight from the B. & A. railroad on skids across the defendant's track to and across the platform, and that that part of Coffee street was a public street in constant use and that a great many people travelled it; then it was gross negligence to so run the engine, and the jury should find their verdict for Stringer, if they so believe that such gross negligence was the proximate cause of his injuries." (7.) "To run a train at a high rate of speed and without signals of approach at a point where the trainmen have reason to believe there are persons in exposed positions on the track, and where the public are accustomed to pass on the track with such frequency and in such numbers, and where there

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is an unguarded crossing in a populous district of a city (facts known to those in charge of the train), as that they will be held to a knowledge of the probable consequences of running at such rate without warnings, will impute to them reckless indifference and will render their employer liable for injuries resulting from so running such train, and notwithstanding there was negligence on the part of the person injured and no fault on the part of the servants after they saw or ought to have seen him." (8.) "If the jury believe from the evidence that Stringer was injured by being run against by the defendant's engine on Coffee street, in the city of Talladega, while passing across or along said street at a point where the trainmen had reason to believe there were persons in exposed positions on the track, and where there was a public warehouse in use fronting on said street, from and into which freight was loaded and unloaded across the track on which the engine was being run, and that such point on Coffee street was in a populous district of the city of Talladega, and that at such point there was at that time a force of hands engaged in putting down a sewer in said street, and that there was a dense cloud of steam across said street which could not be seen through, and that these facts were known to those in charge of said engine, and that such facts were sufficient to give those in charge of the engine reason to believe there were persons in exposed positions on the track, and that when the engine struck Stringer it was running at from 10 to 20 miles an hour, and that the bell was not being rung nor the whistle being blown, and that Stringer's injuries were caused by the running of said engine at such rate of speed without warnings, then such persons in charge of the engine are held in law to a knowledge of the probable consequences of so running without warnings, so as to impute to them reckless indifference which renders the defendant liable for Stringer's injuries, and they are so liable notwithstanding there was negligence on the part of Stringer in so being on the track and no fault on the part of the engineer and fireman after they saw or ought to have discovered any thing which indicated probable danger to human life, and the jury should render a verdict for Stringer." (9.) "When a suit is brought against any corporation it can not be permitted to deny the right of the person suing to bring and maintain his suit against the corporation by the name in which it keeps its books, and accounts, gives receipts and takes receipts and transacts all of its other business and by which it is generally known." (10.) "If the evidence shows to the satisfaction of the jury

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that Stringer was injured by defendant's engine running against him upon Coffee street, in the city of Talladega, under such circumstances as does not make him guilty of contributory negligence, then if the jury believe from the evidence that if the bell had been ringing or the whistle blown Stringer would have heard it and gotten out of the way, the burden is on the defendant to prove that the bell was being rung or the whistle blown, and if the testimony on this point leaves it in doubt and uncertainty in the minds of the jury as to whether or not the bell was being rung or whistle blown, then the jury should find for Stringer."

There were verdict and judgment for defendant, and plaintiff appeals, and assigns as error the rulings of the court in giving and refusing the several charges asked.

CECIL BROWNE, for appellant.—1. The evidence in this case did not warrant the giving by the court of those charges which affirmed that there was no evidence of either gross negligence or wantonness on the part of defendant's employees. This, under the circumstances of this case, was a question for the jury.—*Ga. Pac. R. Co. v. Lee*, 92 Ala. 262; *M. & E. R. Co. v. Stewart*, 91 Ala. 421; *Ga. Pac. R. Co. v. O'Shields*, 90 Ala. 29; *L. & N. R. R. Co. v. Webb*, 90 Ala. 192; *L. & N. R. R. Co. v. Watson*, 90 Ala. 68; *Bentley v. Ga. Pac. R. Co.*, 86 Ala. 485; *Frazer, Adm'r. v. S. & N. Ala. R. R. Co.*, 81 Ala. 199; *Beach on Con. Neg.*, § 65. 2 Defendant's charge No. 1, which asserted that there was no evidence of any "gross negligence" on the part of the employees of defendants, was clearly illegal. Such term does not necessarily imply that degree of wantonness, recklessness, and indifference which would avoid the defense of contributory negligence.—*Carrington v. L. & N. R. R. Co.*, 88 Ala. 477; *M. & C. R. R. Co. v. Womack*, 84 Ala. 149; *Lienkauf v. Morris*, 66 Ala. 406; *Bentley's Case*, *supra*. 3. Charge No. 12 of defendants' charges should not have been given. This charge using the words "as in this case," was in effect the general or affirmative charge. Plaintiff, after using due care, had the right to rely upon a compliance, by those in charge of the train, with the law.—*Lyman v. Boston & Maine R. Co.*, 45 Am. & Eng. R. Cases, 167; *Piper v. C. M. & St. P. R. Co.*, Sup. Ct. Wis. June 21, 1890; *Newson v. N. Y. C. R. Co.*, 29 N. Y. 383; *Thomas v. Delaware, L. & W. R. R. Co.*, 8 Fed Rep. 732; *Penn. R. R. Co. v. Ogier*, 35 Penn. St. 72; *Copley v. N. H. & N. Co.*, 136 Mass. 6; *Beach on Con. Neg.*, § 64. 4. Charge number 1, asked by plaintiff should have been given. It only asserted the gen-

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eral and conceded proposition of law that if a person is injured while lawfully crossing a railroad track, after having stopped, and looked, when listening could be of no avail, then if the injury is proximately caused by the running of the train at an unlawful rate of speed, such person should recover. It is negligence *per se* to run a train contrary to reasonable statutory regulations.—*L. & N. R. R. Co. v. Webb*, 90 Ala. 185; *H. A. & B. R. R. Co. v. Sampson*, 91 Ala. 565. 5. The court erred in not giving charges numbered 2, 3, 4, 5, 7, 8, asked by plaintiff.—*Ga. Pac. R. R. Co. v. Lee*, 92 Ala. 262. 6. Charge numbered 10, asked by plaintiff, was free from error. Code of Alabama, §§ 1144 and 1147. See also note to page 300, Code; *Leak v. Ga. Pac. R. R. Co.*, 90 Ala. 163.

KNOX & BOWIE, *contra*.

COLEMAN, J.—The action is in case to recover damages for personal injuries. There are two counts in the complaint, the first averring simple negligence as the cause of the injury, and the second, that it was caused “by the gross carelessness, wantonness or recklessness,” of the defendant. The first plea of the defendant presented the general issue of “not guilty.” The second plea, that of contributory negligence on the part of plaintiff. No question is reserved as to the sufficiency or irregularity of any of the pleadings.

No recovery could be had upon the second count, except upon proof that defendant was guilty of having wantonly inflicted the injury, or of such reckless negligence, as to be the equivalent of having wantonly or intentionally inflicted the wrong.

The place where the injury occurred was within the corporate limits of the city of Talladega, but not at a public crossing, or other place of such character, or under such conditions, as that defendants were chargeable with notice, in the absence of proof of actual knowledge, that there were persons on the track at the time and place where the injury occurred, or a knowledge that injury would result as the probable consequences of any mere neglect of duty.—*L. & N. R. R. Co. v. Webb*, 97 Ala. 308; *Ga. Pac. R. R. Co. v. Lee*, 92 Ala. 262; *Anniston Pipe Works v. Dickey*, 93 Ala. 420-1; *Chewning v. Ensley R. R. Co.*, 93 Ala. 29. The defendants were entitled to the general affirmative charge upon the second count.—*L. & N. R. R. Co. v. Johnson*, 79 Ala. 436; *B. M. R. R. Co. v. Jacobs*, 92 Ala. 192; *H. A. & B. R. R. Co. v. Winn*, 93 Ala. 308.

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There was no error in refusing the charges requested by plaintiffs, which were predicated on the assumption that there was evidence sufficient to authorize a finding by the jury that defendants were guilty of wanton injury, or that reckless negligence which is its equivalent, and which would entitle the plaintiff to recover, notwithstanding he may have been guilty of contributory negligence.

There was no error in refusing charge No. 2, which seems to have been copied from the opinion in the *Lee Case*, 92 Ala. 262, *supra*. As an abstract proposition of law the charge was correct, but the facts of the case did not admit of the application of the principles of law invoked, and to have given the charge probably would have misled the jury.

The evidence is in conflict as to whether the defendant was guilty of simple negligence. That offered by the defendant tended to show due observance of the statute, requiring signals to be given when passing through cities and towns, and city ordinances, regulating signals and speed of trains, and the evidence of the plaintiff tended to show that both the statute law and city ordinances were disregarded. The weight of testimony and credibility of witnesses, present questions to be determined solely by the jury. If the jury should believe the testimony of the defendant on the question of defendant's negligence, there is an end of the case, and plaintiff could not recover. On the other hand, if the jury come to the conclusion, that defendant was guilty of negligence, which proximately caused the injury, then the question arises as to whether plaintiff was guilty of proximate contributory negligence. On this question the evidence is in conflict. The evidence of the defendant tends to show, that at the time plaintiff was injured, he was standing on the track, or walking along the track. On the other hand plaintiff himself testified, that he was attempting to cross the track, and before stepping upon the track he both looked and listened. That towards the East, he could see up the track for some two hundred yards, and towards the West, he could see over forty yards, to a place on the track where a jet of steam from a drilling machine, was thrown upon and across the line of track, which shut off any further vision of the track. Plaintiff further testified that he could have heard the ringing of the bell, or blowing of the whistle, if defendant had complied with the statute, requiring signals to be given, and he further testified, that he could and would have crossed in safety, if the train had obeyed the ordinance of the city, limiting its speed, while running with-

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in its corporate limits. Here again the jury must determine what facts are true.

At the place where the plaintiff was injured, he had no right to stand upon defendant's track, or walk along the track. His only right was the right of crossing. If he was standing on the track or walking along it, he was a trespasser. If he was merely crossing the track, a right he undoubtedly had in the transaction of business, and had exercised due caution, had looked and listened and thus assured himself he could with safety venture across, and while in the exercise of the right to cross, was injured by the negligence of the defendant, the plaintiff would be entitled to recover. This is the rule as declared in the case of *Glass v. Mem. & Char. R. R. Co.*, 94 Ala. 587, and we think it a sound rule, and adhere to it.

It is contended that plaintiff ought to have gone on the west side of the steam jet so that he could have seen along the track in that direction a sufficient distance to have made sure that he could cross with safety. The soundness of this contention, depends upon the credibility of other evidence in the case. If, as testified to for plaintiff, the passenger train from the East was momentarily expected, and, according to schedule of time, none was expected from the West, and he had no information that the freight train from the West was delayed, and plaintiff took the precaution to attempt a crossing far enough on the east side of the jet, at a point where he could see the passenger if it was approaching, and far enough away from the jet of steam to safely cross, if the train-men complied with the statute and city ordinances, as to speed and warnings, and he both looked and listened for approaching trains, and neither stood upon the track, nor walked along the track, but across the track only, then it could not be said he was guilty of contributory negligence, which proximately contributed to his injury; and if defendant was guilty of negligence in running at an unauthorized rate of speed or failed to give the proper signals or warning, and its neglect in these respects caused the injury, then plaintiff would be entitled to recover. The rules of law and city ordinances, regulating warnings and speed in cities and towns, were intended to prevent the infliction of injuries in such and similar cases.

On the other hand, if plaintiff was standing on the track, or walking along the track, and, while thus unlawfully using defendant's right of way, was injured, he could not recover, although defendant may have been guilty of negligence in

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the failure to give warnings of its approach, or to comply with the rate of speed fixed by the ordinance of the city.

The evidence shows without conflict, that defendants were not derelict in duty after a knowledge of plaintiff's peril. The words "gross," "reckless," when applied to "negligence," *per se* have no legal significance which import other than simple negligence or a want of due care.—*K. C. M. & B. Railroad Co. v. Croker*, 95 Ala. 412; 11 So. Rep. 262; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435; 11 So. Rep. 453.

Our decisions recognize but two grades of negligence, if indeed one strictly and technically speaking can be regarded as negligence. There is simple negligence, or want of due care, which, when it is the proximate cause of injury, will support an action and authorize a recovery, the party injured, not being guilty of contributory negligence. Then there may be such reckless or wanton disregard of probable consequence, known to the person guilty of the wrong, or under circumstances that knowledge of the probable consequences of his wrong doing will be imputed to the wrong doer, as to be the equivalent of a willful and intentional injury, or there may be a negligent omission of preventive effort, after knowledge of danger. Proof of the latter character of negligence, will authorize a recovery although the party injured may have been guilty of contributory negligence, unless the contributory negligence on his part is of the same character as that of which the defendant was guilty, in which event, he would not be entitled to a verdict. The law as declared in the head notes of *Ensley R. R. Co. v. Cheuning*, 93 Ala. 24, is correct, but the definition of the term "gross negligence," therein given is not found in the text of the opinion, and is not to be received as a universally correct legal definition of the phrase. 16 Am. & Eng. Encyc. of Law, pp. 426-7, § 16.

In some of the charges given at the request of the defendant, the word "gross," was used in the sense of "willful" or "wanton," and in this respect the court erred. Charge No. 9, given for defendant, in which a rule as to positive and negative testimony is laid down was perhaps misleading, in not predicating equal means of knowledge, and the credibility of the witnesses, but there is no error in giving the charge, which would require a reversal for this cause. *Ensley R. R. Co. v. Cheuning*, 93 Ala. 31.

We believe we have considered every question raised by the record, or which can possibly arise on another trial.

Reversed and remanded.

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Bill in Equity to enjoin Sale under Execution.

1. *Evidence of intention not admissible; objection thereto may be waived.*—Evidence of one's intention is not admissible; but where intention is the fact to be ascertained, the objection to proving it by the testimony of the person himself may be waived, and when so proven the evidence is legal and relevant.

2. *Homestead exemption; abandonment.*—Temporary absence from a homestead for less than 12 months is not an abandonment, so long as there exists in the owner the *animus revertendi*.

3. *Same.*—When, after a claim of homestead exemption has been duly made and filed, the owner during a temporary absence leases the premises for a period less than one year, his right to such exemption is not forfeited, provided the *animus revertendi* continued to exist; and a sale of the premises within 12 months from the time of his leaving is a conveyance of the homestead.

4. *Same; sale of, can not be impeached by creditors.*—A sale of property, exempt as a homestead, can not be impeached by creditors, and this, notwithstanding the sale may have been fraudulent, and made to hinder, delay or defraud the creditors.

5. *Res inter alios acta* — Proceedings in a contest of a homestead exemption between an execution creditor and his debtor, are *res inter alios acta* as to the debtor's grantee, who files a bill to enjoin a sale under the execution.

APPEAL from Chancery Court of Cullman.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed by the appellant, Mrs. E. L. Fuller against the appellees; and sought to enjoin the sale of a portion of a lot which she had purchased, and to quiet her title thereto. The facts of the case are sufficiently stated in the opinion. Upon the submission of the cause, on pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed, and ordered the temporary injunction dissolved, and dismissed the bill. Complainant appeals, and assigns as error the final decree of the chancellor.

ROBERT C. BRICKELL and GEORGE H. PARKER, for appellant.—After the declaration and claim of homestead has been duly made and filed, a temporary quitting of the homestead for a period of not more than 12 months at any one time, is not an abandonment.—Code of 1876, § 2843; Code of 1886, § 2539; *Hines v. Duncan*, 79 Ala. 112. The evidence in this case

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shows that the leaving of the homestead was temporary, with the intention to return to it. Property which is exempt from sale as a homestead can be sold and conveyed at any time, and of such sale the creditors of the grantor can not complain.—*Clark v. Spencer*, 75 Ala. 57; *Alley v. Daniel*, 75 Ala. 403; *Fellows v. Lewis*, 65 Ala. 343; *Lehman v. Bryan*, 67 Ala. 558; *Wright v. Smith*, 66 Ala. 514; *Hines v. Duncan*, 79 Ala. 112; *Thompson on Homestead*, §§ 404-12, 435. While it is not competent for a witness to testify as to his intention, an objection as to such testimony may be waived, and when so waived the evidence is legal and relevant.—*Shutte v. Thompson*, 15 Wall. 160; 1 Index Dig. U. S. Sup. Ct. Rep. p. 149, §§ 1520, 1529. The proceedings in the contest of exemption between Whitlock and Beckert are *res inter alios acta* as to the complainant in this case.

HEAD J.—In 1882, Chas. A. Beckert owned and occupied, as his homestead, lot 403, in the town of Cullman, Ala. In March of that year he removed from Cullman to Decatur, Ala., and was there engaged in the service of the United States. On October 30th, 1882, he and his wife conveyed the lot by deed to H. P. McIntire for the recited consideration of \$500.00. On April 20th, 1883, McIntire conveyed the lot by deed to Mrs. Ida M. Beckert, who was the wife of said Charles A., for the recited consideration of \$500.00. On November 16, 1886, Mrs. Beckert and her husband, the said Charles A., conveyed by deed to the complainant, Mrs. E. L. Fuller, a part of said lot, for the recited consideration of \$400.00, and Mrs. Fuller went into immediate possession and occupation of the part so purchased, and so continued up to the filing of this bill. In November, 1881, the appellee, W. L. Whitlock, obtained a judgment in the Circuit Court of Cullman County, against said Charles A. Beckert for the sum of \$437.60 and costs, upon which execution regularly issued, on December 23d, 1881, to the sheriff of that county, and thereafter other executions were regularly issued, without the lapse of a term, until November, 1883, when one was issued and levied by the sheriff on the said lot number 403, as the property of the defendant therein, the said Charles A. Beckert. On November 27, 1877, Beckert, who then owned and actually occupied the lot as his homestead, made his declaration, in writing, verified by his oath and signed by him, wherein he described the said lot and claimed the same as his homestead, and as exempt from levy and sale, under execution or other process for the collection of debt, and filed the same in the office of the judge of probate of

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Cullman County for record; and on the 7th day of December 1877, the same was duly recorded. Again on the 28th day of February, 1882, he made and filed and had recorded, in the same office, another and similar declaration and claim of homestead in and to said lot. Whitlock, the plaintiff in execution, contested these claims of exemption by affidavit duly made, under the statute, and the matter of the contest depended in court until May 1, 1887, when upon trial in the Circuit Court, judgment was rendered in favor of the plaintiff, Whitlock, condemning the lot to the satisfaction of the execution; which judgment it seems, was subsequently affirmed by this court on appeal.—*Beckert v. Whitlock*, 83 Ala. 123. Thereafter, on the 17th day of January, 1888, an order of sale and a *fiery facias* issued on said judgment to the sheriff of said county, who levied the latter on said lot, and was proceeding to advertise and sell the same under the processes in his hands, when this bill was filed by Mrs. Fuller to enjoin the sale of that portion of the lot she had purchased, and to protect and quiet her title to the same. At no time prior to the sale and conveyance of the lot to McIntire, on Oct. 30, 1882, nor at that time, was it worth more than two thousand dollars, the limit of value allowed under our homestead laws.

The case presents but a single question. Was the lot in question still the homestead of Charles A. Beckert when he conveyed it to McIntire, or had he, theretofore, abandoned it as a homestead? It is not denied that he actually occupied it as the home of himself and family up to March, 1882, and that during that month, he left the place and went to Decatur and engaged, as a gauger, in the service of the United States. Section 2843 of the Code of 1876, which was in force at the time of these transactions, reads as follows: "When a person has a right of homestead under this chapter, or any other section relating to exemptions, a temporary quitting or leasing the same for a period of not more than twelve months, at any time, shall not be deemed to be an abandonment of it as his homestead; but if he shall make and file the declaration and claim, as herein provided, it shall remain subject to same right of homestead as if he had continued in the actual occupancy thereof." It is shown without dispute that Beckert did not lease the place for a period of more than twelve months, but on the contrary that he rented a part only of the house to a tenant, by the month, and kept his furniture and effects in another part of the house. It is shown also that he had not been absent from the place as long as twelve months when he sold to McIntire.

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The question then arises, was his quitting the premises temporary or permanent, which means, did he quit with the intention of returning, within twelve months, and again occupying the place as a home, or did he intend his removal to be permanent, or to extend beyond a year? The respondents have relieved this question of difficulty by taking and introducing the depositions of Mr. and Mrs. Beckert, which is practically the only testimony, in their behalf, touching the question. Directly responsive to interrogatories propounded by respondents, Charles A. Beckert testified as follows: "I did not abandon my homestead rights in that lot until the last portion of it was sold to H. P. McIntire by me. When I left Cullman in May, 1882, I went to Decatur, Ala., in the service of the U. S. Government. I said that I should always consider Cullman my home. I rented a part of the lot containing the house to Otto Cullman. I rented to him by the month. I lived in Decatur something over a year, but was preparing my house in Cullman for a residence and re-occupation during that time." And on cross-examination he testified: "I did regard said lot as my home, and did have some property in the house even until after the sale to H. P. McIntire. I did say when I went to Decatur in May, 1882, that I was going to stay there temporarily, and I considered Cullman my home. I do not remember now whether I so stated to Mr. Armbenster or not. It was my intention to return to Cullman as shown by my return. I did so swear on the trial of the contest of exemptions in the Circuit Court of Cullman County." And Mrs. Beckert, responding to the respondent's interrogatories, testified as follows: "He did not abandon his homestead on said lot. He said that he should consider Cullman as his home, and would return there. The reason of his moving from said property in Cullman is a private family matter and not connected with this suit. The part of the lot containing the house was rented to Otto Cullman. I do not know for what length of time it was rented. He lived in Decatur, Ala., over a year in the service of the U. S. Government, but during the latter part of the time he was preparing the house in Cullman for occupancy as a residence." S. L. Fuller, who was examined by complainant, testified: "On the 30th October, 1882, he" (Charles A. Beckert) "was also in possession" (of the lot in question) "holding and using it as his homestead, occupying a portion of it with his household goods and William Emmel occupying another part of said lot as the tenant of said Beckert. I know that he occupied it as such tenant for he was my bar keeper at the time. On or about

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this date Chas. A. Beckert told me in person that he claimed said lot as his homestead, that he had only left it temporarily, and was at the time having some repairs put on the same. } . . . On or about March 18, 1882, Chas. A. Beckert got married and left the same night on a wedding trip to Decatur, and on account of some trouble with his grown children growing out of said marriage, he remained there some days and while there, received the appointment of United States gauger, and remained at Decatur for some time in that business, living in the house of Mr. C. C. Sheets, or kept house for him, after which he returned to Cullman and occupied the house and lot in question." Mrs. Fuller's testimony corroborated that of her husband, S. L. Fuller, above stated. What we have stated is practically all the evidence shedding light on the question under consideration. We have seen the respondents themselves introduced the emphatic testimony of Beckert and his wife as to the former's intention when he left the place and went to Decatur. It is true, under our rulings, that evidence of one's intention is not admissible against the objection of the party against whom it is sought to be introduced, the rule being that intention must be established as an inference from the conduct of the party and the circumstances surrounding him. It seems that nearly all the States of the Union hold the contrary doctrine. For a full discussion of the subject, see note to *Gardon v. Woodward*, 21 Am. St. Rep. 310. But whether our rule be the better one or not, we have no doubt that where intention is the fact to be ascertained, objection to this mode of proving it may be waived, and the evidence, when so introduced, is legal and relevant. Taking this case, then, in the condition we find it, we are forced to conclude that Beckert did not intend to abandon and forfeit his homestead, and that his quitting the premises was temporary within the meaning of the statute. Such being the case the lot continued to be his homestead until he sold and conveyed it to McIntire in October, 1882.

It is immaterial to inquire whether that sale was made with the intent to hinder, delay or defraud creditors. Being exempt from the payment of debts, the owner could make any disposition of it he chose, and creditors could not complain. This is the well settled doctrine of this court.—*Fellows v. Lewis*, 65 Ala. 343; *Lehman v. Bryan*, 67 Ala. 158; *Wright v. Smith*, 66 Ala. 514; *Alley v. Daniel*, 75 Ala. 403; *Hines v. Duncan*, 79 Ala. 112; *Clark v. Spencer*, 75 Ala. 49, and cases there cited. Besides, if the property was subject to levy and sale at all, the lien of Whitlock's execution was

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in full force at the time of the sale to McIntire, and was thereafter preserved down to the filing of this bill. That lien, if it had existed, was all efficient to protect the rights of Whitlock, without considering the question of fraud. But the property was the homestead of the debtor, and there was neither execution lien upon it, nor right in any creditor to attack its sale as fraudulent.

It is obvious that the judicial proceedings in the matter of the contest of the claim of exemptions were *res inter alios acta* as to the complaint.—*Beckert v. Whitlock*, 83 Ala. 123.

The decree of the chancellor is reversed, and a decree will be here rendered granting the relief prayed by the bill.

Reversed and rendered.

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Jasper Trust Co. v. K. C., M. & B. R. R. Co.,

and

Southern Express Co. v. Jasper Trust Co.

Action to recover Damages for the False Issue of a Bill of Lading by a Railroad Company; and to recover Damages from an Express Company for Failing to deliver Money.

1. *Bill of lading; right of bona fide purchaser.*—A *bona fide* purchaser of a false bill of lading from the person to whom it was issued by a railroad company's agent, may hold the company liable to the extent of advances made by him on such bill of lading, under section 1179 of the Code of 1886.

2. *Same; estoppel of carrier.*—As between a railroad company issuing a bill of lading, regular on its face, and one who shows himself to be the *bona fide* transferee or purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in such receipt.

3. *False issue of bill of lading by agent of railroad Company; inquiry necessary by endorsee.*—When a railroad company's agent issues a bill of lading to a fictitious firm, for goods never received, and endorses it in the name of said firm, the endorsee is put upon inquiry concerning the endorsing firm; and failing to inform himself as to whether there was such a firm, and not obtaining the endorsement from the firm to whom the bill of lading was issued, he can not recover damages from the railroad company under section 1179 of the Code of 1886.

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4. *Express company; embezzlement by agent.*—Where, through fraud or false pretenses of the agent of an express company, one is induced to deliver money to such express company to be carried and delivered by it to a fictitious firm, and the express company receives, gives its receipt for the money, carries it to the place of destination, and delivers it to such agent, who embezzles the money, the sender can recover the amount from the express company.

APPEALS from the Circuit Court of Walker.

Tried before the HON. JAMES B. HEAD.

The causes of action in each of these two cases arose out of the same transaction, and being so intimately connected they were submitted and considered together.

In the first case, the Jasper Trust Co. sued the Kansas City, Memphis & Birmingham Railroad Company, to recover damages alleged to have been suffered by the plaintiff by reason of the alleged issue of a fraudulent bill of lading by an agent of the said railroad company; said bill of lading acknowledging the receipt of 30 bales of cotton, on the faith of which receipt and acknowledgment, expressed in the bill of lading, the plaintiff advanced the amount for which the action was brought, when, as a matter of fact, no cotton was received by the defendant. In this case there was judgment for the defendant, and plaintiff appeals. In the second case, the Jasper Trust Company sued the Southern Express Company for the failure to deliver a package of money to R. H. Sandford & Co. There was judgment in this case for the plaintiff, and defendant appeals. Both of the judgments are affirmed in this court.

The facts in each case are sufficiently stated in the opinion. In the case against the Kansas City, Memphis & Birmingham Railroad Company, the defendant, after the introduction of all the evidence, requested the court, in writing, to give the general affirmative charge in its behalf. The court gave this charge, and the plaintiff duly excepted.

In the case against the Southern Express Company the complaint contained two counts. The first seeks to recover for the failure of the defendant to deliver the certain moneys sued for, which were delivered to it as a common carrier to be delivered to R. H. Sandford & Co. The second count claims the same sum for money had and received.

Upon the introduction of all the testimony, the court, among other things, instructed the jury as follows: "If D. R. Sandford, being the agent of the railroad company, made out and signed the bill of lading in question for the purpose of defrauding or imposing on plaintiff, without having any cotton for shipment thereunder or expecting to have any, but that the bill of lading was spurious and fraudulent, and

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if D. R. Sandford fraudulently procured plaintiff to ship the money to R. H. Sandford & Co., and if D. R. Sandford, as agent of defendant, received the money, it was his duty as agent of defendant to hold the money when it came into his hands as agent of the Express Company for the use of plaintiff, and if he failed to do so the defendant is liable in this action." The defendant excepted to this portion of the court's general charge, and also separately excepted to the court's refusal to give each of the following charges requested by it: (1.) "It was the duty of the Jasper Trust Company to ascertain with whom it dealt, and in shipping money to R. H. Sandford & Co., at their request, it was the duty of the Jasper Trust Co. to ascertain with whom it dealt, and who R. H. Sandford & Co. was, and if by failure to make such proper and necessary enquiries the money was delivered to a fictitious firm, then the plaintiff has no right to a verdict." (2.) "If the jury believe from the evidence that D. R. Sandford, or D. R. Sandford and his brother composed the firm of R. H. Sandford & Company, and if the jury further believe that the money was delivered to D. R. Sandford for R. H. Sandford & Co., then the Jasper Trust Co. is not entitled to a verdict." (3.) "The burden of proving that the money was not delivered to R. H. Sandford & Co. is on the plaintiff, and if the plaintiff, the Jasper Trust Company, has failed to prove that the money was not paid over or delivered to R. H. Sandford & Co., the verdict must be in favor of the Southern Express Co." (4.) "If D. R. Sandford, under the name of R. H. Sandford & Co., wrote the Jasper Trust Co. to send the money, and Jasper Trust Co. sent the money to R. H. Sandford & Co., and D. R. Sandford received the money from the Express Co., then the Express Co. is not liable." (5.) "If the jury believe the evidence they must find a verdict in favor of the defendant, the Express Company."

COLEMAN & SOWELL, for Jasper Trust Company, cited, *Bank of Batavia v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 195; *Savings Bank v. A., T. & S. F. R. R. Co.*, 20 Kansas 519; *Sioux City & Pa. R. R. Co. v. First National Bank of Fremont*, 10 Nebraska, 556; *Brooke v. N. Y., L. E. & W. R. Co.*, 108 Penn St. 529; *St. Louis and Iron Mountain R. R. Co. v. Larned*, 103 Ill. 293; *Relyea v. New Haven R. M. Co.* 42 Conn. 579; *Michel v. Ware* 3 Nebraska, 229; *McCord v. W. I. T. Co.*, 1 L. R. A. 143.

J. J. ALTMAN, for Southern Express Co. 1. The general affirmative charge should have been given for the Southern
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Express Company., 61 Ala. 158; 14 Am. Rep. 576; 110 Mass. 26; *Edmunds v. Merchants' Despatch Transportation Company*, 135 Mass. 283; 135 Mass. 218; 4 N. E. Rep. 619; Benjamin on Sales (Bennett), § 436. 2. The court erred in its oral charge. If there was fraud on the part of D. R. Sandford, it was fraud committed while acting as agent of the railroad company. *Frenkel vs. Hudson*, 2 So. Rep. (Ala.) 758; 1 American Rep. 164; 10 New York, 68. 3. Plaintiff cannot treat the bill of lading as a nullity and look to defendant for any loss plaintiff may have sustained by it. Code of Ala., §§ 1175-1179; 106 New York 95; 65 New York 111; 135 Mass. 283; 8 So. Rep. 384.

WALLACE PRATT and HEWITT, WALKER & PORTER for Railroad Co.—1. At common law a common carrier is not liable for damages suffered by the assignee of a fraudulent bill of lading, who advances money on the faith of its receipt, issued by the agent of the carrier, without having received any goods as receipted therein, and in furtherance of the design to defraud. *Cox v. Keahey*, 36 Ala. 340; *Railroad Co. v. Webb*, 49 Ala. 240; *Water Works Co. v. Hubbard*, 85 Ala. 179; *Grant v. Norway*, 2 Eng. L. & E. Rep. 337; *Coleman v. Richards*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Coal Co.*, L. R. 10 C. P. 562; *McLean v. Fleming*, L. R. 2 H. L. 128; *Cox v. Bruce* 18 Q. B. D. 147; *Meyer v. Dresser*, 16 C. B. 646; *Jessel v. Bath*, L. R. 2 Exch. 267; *Hickox v. Buckingham*, 18 Howard, 182; *Lady Franklin*, 8 Wallace 325; *Pollard v. Vinton*, 105 U. S. 7; *Railway Co. v. Knight*, 122 U. S. 79; *Robinson v. M. & C. R. R. Company*, 9 Fed. Rep. 129; *Sears v. Wingate*, 85 Mass. 103; *Railway Co. v. Wilkin*, 44 Md. 11; *Fellows v. The Powell*, 16 La. Ann. 316; *Bank v. Laveille*, 52 Mo. 380; *Williams v. Railway Co.*, 93 N. C. 42; *Dean v. King* 22 Ohio State 118; *Bank of Commerce v. C. B. & N. R. R. Co.*, 46 N. W. Rep. 346. 2. The Jasper Trust Company was put on inquiry, both as to the extent of the defrauding agent's authority, and as to the existence of the facts essential to its exercise. *Farrington v. South Boston Railway Co.*, 150 Mass. 406; *Smith v. Los Angeles Ass'n.*, 20 Pac. 677; *Clafin v. Farmers' Bank*, 25 N. Y. 293; *Shaw v. Railroad Co.* 101 U. S. 557; *King v. Sparks*, 77 Ga. 285; *Tyree v. Lyon*, 67 Ala. 1; *N. Y. Iron Mine v. First National Bank*, 39 Mich. 644. 3. The statute, Code of 1886, section 1179, does not have the effect of imposing on the carrier absolute liability on a bill of lading in the hands of an assignee, appearing to be regular on its face and bearing the signature of the

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agent, regardless of the circumstances attending its issue and attending the taking of it by the assignee. *Zeigler v. S. & N. R. R. Co.* 58 Ala. 599; *Stoudenmire v. Brown*, 48 Ala. 699; *Davis v. Minge*, 56 Ala. 121; *Oliver v. Robinson*, 58 Ala. 46; *Shaw v. Railroad Co.*, 101 U. S. *supra*; *Bank v. C. B. & N. R. R. Co.*, 46 N. W. Rep. 560; *Jacob Dold Packing Co. v. Ober & Sons*, 71 Md. 155. 4. Bills of lading are not negotiable in this State: *Moore v. Robinson* 62 Ala. 537; *Leigh v. M. & O. R. R. Co.*, 58 Ala. 165.

STONE, C. J.—These two cases are so intimately connected with each other that we will consider them together.

The Jasper Trust Company, located at Jasper, was engaged in banking. On the Kansas City, Memphis & Birmingham Railroad, distant from Jasper some sixty miles, is a railroad station known by the name of Sulligent, and the Southern Express Company has an office there. D. R. Sandford was depot agent of the railroad at that place, and was also agent of the express company; he filling both offices at that station. On September 9, 1890, D. R. Sandford, as agent of the railroad company, signed a bill of lading, using one of the railroad's blanks, by which he acknowledged to have received from R. H. Sandford & Co. thirty bales of cotton weighing 15,000 pounds, in apparent good order, to be delivered to Barry, Thayer & Co. at Boston, Massachusetts. On the back of this bill of lading is this indorsement without date: "Deliver to Jasper Trust Co., R. H. Sandford & Co." The original bill of lading has been sent up under the trial court's order for our inspection. We find a very striking resemblance and similarity in the two signatures—D. R. Sandford to the bill of lading, and R. H. Sandford & Co. to the indorsement.

Soon after the issue of this receipt, a draft was drawn on Barry, Thayer & Co., Boston, Mass., bearing the signature of R. H. Sandford & Co., for a sum approximating the value of thirty bales of cotton, in favor of the Jasper Trust Company; and this draft, with the bill of lading attached and indorsed to it, as copied above, were forwarded to the Trust Company, and by it discounted. That company thereupon attempted to remit the proceeds of the draft, something over eleven hundred dollars, to R. H. Sandford & Co. at Sulligent; and to that end delivered the money to the Southern Express Company, taking its receipt and obligation to pay and deliver the same to R. H. Sandford & Co. Soon afterwards D. R. Sandford, the agent alike of the rail-

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road and the express company, absconded, carrying with him said sum of money, together with other moneys obtained by similar practices.

The bill of lading, acknowledging the receipt of the thirty bales of cotton to be shipped, was false and fraudulent, no cotton in fact having been received. Nor was there such a firm as R. H. Sandford & Co. The entire transaction was planned and carried into effect by D. R. Sandford, the agent. He issued the false bill of lading; issued it to R. H. Sandford & Co., when there was no such firm or business house. He indorsed the pretended name of this fictitious firm on the bill of lading, to give it negotiability, and to enable him to consummate his fraudulent scheme. The money, consigned to this fictitious firm, in due course of business came to him as the express company's agent at Sulligent, and he did not deliver it to R. H. Sandford & Co. He could not, for they were a fiction.

The Jasper Trust Company instituted these two suits; the one against the railroad company for the non-delivery of the thirty bales of cotton. This suit under the trial court's ruling terminated in favor of the defendant. The facts were all agreed on, and at the written request of the defendant, the railroad company, the court charged the jury that if they believed the evidence they should find for the defendant. They so found.

There can be no question that before February 28, 1881, the Trust Company was without right to maintain this action. Advancing money on a false bill of lading given by the railroad's agent would have placed them upon no higher ground than the person to whom it was improperly issued would have occupied. It was in no sense a negotiable instrument.—*Moore v. Robinson*, 62 Ala. 537.

On February 28, 1881—Sess. Acts, 133—the act was approved "To prevent the issue of false receipts," &c. The principles of that statute have been carried into the Code of 1886, commencing with section 1175. We quote from section 1179: "If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, . . . such carrier . . . or person is liable to any person injured thereby for all damages, immediate or consequential, therefrom resulting."

An argument, prepared with great labor and research, has been submitted by the appellee. Its contention is that while D. R. Sandford was the accredited depot agent to execute bills of lading for freight to be transported on the railroad,

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he had no authority to execute such bills, unless the thing or merchandise to be transported was in fact received. That, as the cotton specified in the bill of lading was not received, Sandford transcended his delegated authority when he gave the receipt, and fastened no liability on the railroad company. This ingenious argument is followed by many citations of authority.

In the absence of our statute, the foregoing argument would be conclusive. The bill of lading not being, in any sense, a negotiable instrument, the indorsee could assert no greater rights than the indorser could have asserted.—2 Amer. & Eng. Encyc. of Law, 241, and notes. The argument claims that our statute has wrought no change in this rule.

It seems to us that a full answer to this contention is found in the fact that such interpretation would practically annul that part of the statute which we have copied. Corporations are artificial entities or things, and can act only through human agency. Deny to them this agency, and they are left without power to do any act, or to achieve any result. The depot agent, in executing a bill of lading, is the railroad company speaking through him. His delegated power is restricted, it is true, for he is authorized to receipt for freight, only when the freight is actually delivered to the railroad. But agents are sometimes false to their trusts, and injury to innocent outsiders is the consequence. It was this which rendered the statute under consideration necessary, and caused its enactment. The legislature realized that carriers or their agents might be negligently or intentionally derelict, and that damage, immediate or consequential, might result therefrom. To visit the loss thus occasioned on the carrier, was simply placing the penalty where personal fault, or that of an agent, had caused the injury to be inflicted. Not to give the statute this interpretation, is to deny to it all operation, when a corporation is the carrier. Its whole intention was to punish and prevent the giving of a bill of lading, when the property or thing was not in fact received for transportation; and if we limit the carrier's liability to cases in which the property or thing receipted for is actually received, do we not leave the statute without any purpose to be accomplished? Its language is, "Not having received things or property for carriage, shall give or issue a bill of lading or receipt, as if such things or property had been received." This makes the statute precisely applicable to the case we have in hand; and not to give it such construction would be to deny it all operation as against corporations.

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Our statute was preceded by statutes on the same subject alike in England and in many of the States of this Union. See them referred to in 2 Amer. & Eng. Encyc. of Law, 241-2, and notes. It was enacted to prevent frauds, sometimes perpetrated through spurious bills of lading. It was not intended to make them negotiable instruments, like bills of exchange. Though transferable "by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue, or are intended to result from such negotiation." The statute must not "be construed as altering the common law, or as making any innovation therein, further than the words import."—*Shaw v. Railroad Co.*, 101 U. S. 557.

A bill of lading, regular on its face and issued by a carrier, or its authorized agent, is a certificate that the person to whom it is issued is the shipper of the property or the goods therein described, that they really exist, and are subject to the order and direction of the shipper unless the bill of lading furnishes notice that such is not the fact. And our statute is authority for any one to deal with the person to whom such bill of lading is issued, on the basis and postulate that the property or goods in fact exist, are in the possession of the carrier, and subject to the conditions expressed in the bill of lading. Any one to whom such bill of lading is indorsed and transferred by the person to whom it was issued, and who parts with value and becomes the innocent holder of it without notice, may hold the carrier responsible for the truth of its recitals, and for damages to the extent he may have advanced on the faith of its genuineness and truth as a bill of lading. Code of 1886, § 1179, last clause. As between the railroad company and any one who shows himself a *bona fide* transferee and purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in the receipt.

Still, as we have said, such indorsed bill of lading is not raised to the elevated plane of bills of exchange and other negotiable instruments. A bill of exchange payable to a fictitious person, may under some circumstances, be negotiable, and the holder, if without notice and for value, may be protected against defenses, original or intermediate. 1 Daniel Neg. Instruments, §§ 136 *et seq.* This principle, however, can not, and does not apply to bills of lading. They are not transferable by delivery, and possession of them by any person, of whose ownership the writing furnishes no proof, raises no presumption of change of property in the

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thing receipted for. The statute makes no express provision for their indorsement or transfer, but it is alike natural and reasonable that any one who claims to have succeeded to the ownership of the chattels or things expressed in the writing, must furnish the proof of such changed ownership. Indorsement will accomplish this. Who can indorse? Only the person to whom the bill of lading is given—the person the paper declares to be the owner and shipper, or his authorized agent. The power exists in no one else; and if any outsider, having no authority therefor, attempt to indorse, or otherwise transfer it, no title or right to the property or things therein expressed is thereby transferred or incumbered. It is unlike a bill of exchange or negotiable note, which is perverted to a use other than that to which, by the terms of the agency, it was alone authorized to be applied.—*Saltmarsh v. Tuthill*, 13 Ala. 390.

The question then comes up, who can transfer a bill of lading, or incumber it, so as to vest a title or right in the transferee? Manifestly this can be done only by the person to whom it is issued, or with his authority. If a stranger obtains unauthorized possession of it, and perverts it to unauthorized uses, no one who trusts such stranger and parts with value on the strength thereof, can claim damages of the carrier for the injuries he may thereby have suffered. It would be his own fault and folly if he dealt with one having no authority in the premises. He should have inquired.

The bill of lading in the present case was issued to a fictitious firm. There was no such company as R. H. Sandford & Co. That name indorsed on the bill of lading imported nothing, represented nothing. The Jasper Trust Company acquired no rights from R. H. Sandford & Co., for being only an imaginary firm, it could neither have nor transfer rights. The bill of lading being drawn in favor of a person or firm having no real existence, how could it confer any rights on another? Manifestly, having no existence, it neither did nor could confer rights; neither did nor could indorse the bill of lading. And the Jasper Trust Company, acquiring no rights save those conferred on it by the indorsement, was necessarily put on inquiry as to who were R. H. Sandford & Co. That inquiry would have led to the discovery that there was in fact no such firm, but that it was a fiction and a myth. The railroad company has done the Jasper Trust Company no legal wrong, of which the latter company can complain. Its failure to inform itself whether there was such firm as R. H. Sandford & Co.—its failure to obtain an in-

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dorsement of the bill of lading from the person or firm to which it was issued—is a bar to any claim of damages it may assert against the railroad company.

The second suit was against the express company, to recover the money intrusted to it. We have seen that the Trust Company, or bank, was made the victim of fraud and false pretense. No thirty bales of cotton were in fact delivered to the railroad company, and there was no such firm or company as R. H. Sandford & Co. If there had been such company, and the express company had delivered the package of money to it before notice given not to pay, then the express company would have performed its whole contract, and the Trust Company would be without remedy. Such is not this case.—*Yarbrough v. Wise*, 5 Ala. 292; *Wilson v. Sergeant*, 12 Ala. 778.

In the first of these cases—that of the Kansas City, Memphis & Birmingham R. R. Co.—the facts were agreed on, and it was admitted there was no such firm as R. H. Sandford & Co. There was no agreement in the case against the express company as to what the facts were. It was tried on testimony adduced. We have examined the transcript with care, and have narrowly scrutinized the testimony, all of which is set out in the bill of exceptions. The proof is full that D. R. Sandford, the agent, did all the writing and corresponding which purports to have been done in the name of R. H. Sandford & Co. The proof is quite full that there was no such firm as R. H. Sandford & Co., while there was not a semblance of proof that there was, or ever had been such company. We make this statement, because it constitutes an important factor in pronouncing on one or more of the charges requested.

According to the testimony, if believed, the simple and naked facts of this case may be summarized as follows: Through the fraud and false pretense of D. R. Sandford, the Jasper Trust Company was induced to deliver its money to the Southern Express Company to be carried and delivered to R. H. Sandford & Co., at Sulligent. The express company received and receipted for the package, carried it to Sulligent, where it was received by the express company's agent, and by him converted and embezzled. The express company has never performed the contract it entered into, by paying the money to R. H. Sandford & Co., or to any one else authorized to receive it. The present suit is brought to recover that money, as still constructively in the possession of the express company.

It is elementary law that if one, through mistake of fact,

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false representation, or fraud, obtain money from another, an action lies to recover it back, on the simple principle that the one has money which *ex equo et bono* belongs to another.—2 Dan. Neg. Instr's., §§ 136, *et seq.*; Bishop Contr., § 226; 1 Pars. Contr., bottom p. 496; 3 Randolph Com. Paper, §1485; *Rutherford v. McIver*, 21 Ala. 750; 1 Brick. Dig., 140, § 72; *Wilson v. Sergeant*, *supra*. So, if money be transmitted through fraudulent procurement, and while the money is in transit the fraud is discovered and the bearer or carrier is notified not to deliver, then such bearer or carrier becomes the custodian of the money for the use and benefit of him who remitted it and is liable to account to him therefor. But after delivery, demand and notice come too late. The rule in such case is, to this extent, analogous to that which obtains in stoppages *in transitu*.—2 Amer. & Eng. Encyc. of Law, 855; Bishop Contr., § 802.

That part of the court's general charge, to which exception was reserved, is in precise accordance with our views, and is free from error. For the same reason the first charge asked was rightly refused. The second charge asked was abstract, in that there was no testimony to support it. No testimony offered tended to show that D. R. Sandford was a member of the firm of R. H. Sandford & Co., or in fact that there was such firm. It was proved to be fictitious. This charge was rightly refused for this reason. 3 Brick. Dig., 113, § 106. There is nothing in the other charges.

On the case made by the testimony, giving full weight to every thing claimed by defendant as in its favor, the trial court would have been justified in giving the general charge in favor of the plaintiff. Such being the case, we will not inquire specially into the court's rulings in receiving testimony offered by plaintiff. Whether some portion of it was material or not, it neither strengthened plaintiff's case, in any material point, as shown by the unchallenged testimony, nor could it weaken the defense attempted to be made. In such conditions, it is not a reversible error to receive illegal testimony. *Seymour v. Farquhar*, 93 Ala. 292, and authorities cited.

It is not intended, in what we have stated, to affirm that illegal testimony was received in this case. The fundamental fact on which plaintiff's right of recovery depended was D. R. Sandford's machinations, through which he deceived the Jasper Trust Company, and induced it to remit its money to the mythical R. H. Sandford & Co. Every step taken in that chain-work was part and parcel of the fraud he so successfully designed and perpetrated. It can not be ques-

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tioned that every act done which contributed to the consummation of the particular wrong complained of in this case was material and pertinent testimony to go before the jury.

There is no error in either of the records, and each of the judgments must be affirmed.

COLEMAN J., not sitting.

McCLELLAN J., dissenting.

McCall v. American Freehold Land Mortgage Co.

Bill in Equity for Foreclosure of Mortgage.

1. *Stipulation in mortgage for payment of attorney's fees; sufficient averment of necessity for foreclosure in equity.*—When a bill, filed for the foreclosure of a mortgage, alleges that said mortgage contains no provision authorizing the mortgagee to purchase the mortgaged property if sold under the power of sale, and that by reason of the defenses of usury and the denial of the validity of the mortgage by the mortgagor, no third person would purchase at a sale under the power, a necessity to resort to foreclosure proceedings is sufficiently shown; and attorney's fees should be allowed under a stipulation in said mortgage that the mortgagor would pay such fees "if it shall become necessary to employ an attorney to foreclose this mortgage."

2. *Married woman relieved of the disabilities of coverture has power to contract for payment of attorney's fees.*—A married woman relieved of the disabilities of coverture by a decree of the chancellor, "so far as to invest her with the power to buy, sell, hold, convey and mortgage real and personal property," is competent to bind herself and her property by a stipulation in a mortgage for the payment of attorney's fees, and all other expenses of foreclosing the mortgage.

3. *Averments of petition to be relieved of disabilities of coverture; sufficient allegations in bill to foreclose mortgage.*—A petition by a married woman averring that she was the owner of a statutory, separate estate, and praying her disabilities of coverture as to such estate be removed, so far as to invest her with the right to buy, sell, hold, mortgage and convey her said real and personal property, and to sue and be sued as a *feme sole*, alleges the jurisdictional facts necessary to warrant a decree relieving her of the disabilities of coverture; and a bill which avers these facts, and further avers that her husband was made a party defendant to said petition "and, in a writing signed by him and filed in said cause, gave his assent thereto," shows that a decree of the chancellor removing the disabilities of coverture, were based upon a petition which contained the requisite jurisdictional allegations.

4. *Foreign corporations; requisite authority of agents.*—The agent, which foreign corporations are required by the constitution to have

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at a known place of business in this State, need not be invested with any of the contractual powers which the corporation is permitted to exercise by its constating instruments, but it is sufficient if he has authority to accept and receive service of process.

5. *Same; prosecution of suits not the doing of business.*—The institution and prosecution of suits in the courts of this State by a foreign corporation, is not the doing of business here, within the meaning of the constitutional and statutory provisions.

6. *Waiver of right to exemption; not material.*—A waiver of the right to exemption by mortgagee is immaterial when the bill to foreclose the mortgage seeks no relief dependent on or referable to such waiver.

APPEAL from Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by the American Freehold Land Mortgage Company against Laura A. McCall and her husband, T. B. McCall, on August 15, 1890; and prayed the foreclosure of a mortgage, executed by the respondents to the complainant. The bill, as amended, avers that Laura A. McCall was seized and possessed of the lands described therein; that on February 15, 1886, she and her husband, T. B. McCall, becoming indebted to the American Freehold Land Mortgage Company, jointly executed and delivered to said company a mortgage upon her lands; that in said mortgage she and her husband waived all their right and claim to exemption, and agreed that if it should become necessary to employ an attorney to foreclose the mortgage, or to collect any part of the debt secured thereby, to pay such reasonable attorney's fees as may be incurred by the mortgagee in that behalf, and that the mortgage should stand as security for the same. It was further averred that the complainant was a corporation chartered under the laws of the United Kingdom of Great Britain and Ireland, with its home office and residence in the city of London, England, and a branch office and agent in the city of New York, and that by its charter it has full power and authority to lend its money and take notes secured by a mortgage on real estate wherever the same may be situated. That before the taking of the mortgage from Mrs. Laura A. McCall and her husband, the American Freehold Land Mortgage Company appointed E. D. Bowles, of Selma, Alabama, its agent, who was authorized to accept and receive service of process; and had established, kept and maintained an office and known place of business at Selma, Alabama; that Mrs. Laura A. McCall filed her petition in the Chancery Court to be relieved of the disabilities of coverture in accordance with section 2731 of the Code of 1876, and that on January 21, 1884, a decree was rendered relieving her of the disabilities

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of coverture, so far as to invest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*.

The allegations of the bill as to the necessity for filing a bill for foreclosure, and in reference to the removal of the disabilities of coverture of Mrs. McCall, and the stipulations as to the payment of attorney's fees, are sufficiently stated in the opinion.

The respondents demurred to the bill as amended upon the following, among other grounds :

1. That it is shown by the bill that the agreement to pay attorney's fees for the complainant in foreclosing the mortgage and collection of the debt, is without consideration. 2. That there are no sufficient facts or reasons averred in the bill showing the necessity to resort to a court of equity for the foreclosure of said mortgage. 3. That it is not affirmatively shown by said bill that the complainant has filed in the office of the Secretary of State at Montgomery, Alabama, an instrument in writing under its corporate seal, properly signed, designating at least one known place of business in this State, and an authorized agent thereat. 4. That it is not shown by the averments of said bill that the respondents properly waived their right to exemption. 5. That it is not shown by the averments of said bill that Mrs. Laura A. McCall was relieved of the disabilities of coverture. 6. That it was not shown by said bill that the complainant, a foreign corporation, had authorized its agent to exercise for it the contractual powers which the complainant was permitted to exercise by its constating instruments. 7. That it is shown by the bill that its agent only had power to accept and receive service of process, and was not, therefore, such an authorized agent as required by the constitution.

Upon the submission of the cause, on these demurrers, the chancellor overruled the same; and on this appeal by the respondents, his decree in overruling the demurrers is assigned as error.

J. C. RICHARDSON, for appellant.

WEBB & TILMAN, and CALDWELL BRADSHAW, *contra*, cited, *Craddock v. A. F. L. M. Co.*, 88 Ala. 282; *Bedell v. N. E. M. S. Co.*, 91 Ala. 326; *Nelms v. E. A. L. M. Co.*, 92 Ala. 157.

MCCLELLAN, J.—This is a bill filed by the American Freehold Land Mortgage Company against Laura A. McCall and Tristram B. McCall to foreclose a mortgage ex-

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ecuted by the respondents, who are man and wife, on lands belonging to the said Laura A. McCall. The mortgage is made an exhibit to the bill. It contains two distinct stipulations for the payment in stated contingencies by the mortgagors of attorney's fees incurred by the land company. The first of these provisions constitutes the 5th clause of the instrument, and is as follows: "That if it shall become necessary to employ an attorney to foreclose this mortgage or to collect any part of the debt herein secured, they [the mortgagors] will pay such reasonable attorney's fees and all other lawful and proper costs and expenses that may be incurred by the party of the second part [the mortgagee] in that behalf; and this mortgage shall stand as security for the same." The other provision is found in the 6th paragraph of the mortgage in connection with the power of sale by the mortgagor upon default, and is in effect that upon such sale the proceeds thereof shall be applied, so far as necessary to that end, to the "payment of such reasonable attorney's fees as may be incurred" by the mortgagee in and about said sale. It is manifest that the first provision relates to attorney's fees incurred on a bill to foreclose in the Chancery Court, or for the services of an attorney in an action at law on the notes, or in collecting the secured debts by other means than through a resort to the power of sale; and that the latter provision relates to the services of an attorney in the execution of the power of sale. And hence, it is equally manifest that the mortgagors have bound themselves to pay the reasonable fees of complainant's attorneys in this proceeding to foreclose the mortgage as claimed in the bill, if the necessity for the employment of an attorney "to foreclose the mortgage" is sufficiently averred therein. We think it is. The averments in this regard are the following: "That the said mortgage contains no provision, giving authority to your orator to bid for and become the purchaser of said mortgaged property at any sale thereof made by orator, under the power of sale contained therein, and by reason of the defenses upon the plea of usury, as well as because, and for the reason that, as claimed by the mortgagors, orator was a foreign corporation, and had no authorized agent or known place of business in the State of Alabama, at the time of negotiation for said loan of money and the execution of said note and mortgage, and other defenses set up against said mortgage, denying its validity, and the denial of and resistance made by defendants to its validity, no stranger or third person would buy at such sale or become the purchaser of said mortgaged property at any

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such sale, and bid therefor anything like the fair value of the property; and that a sale and purchase by orator of such mortgaged property at a sale made by orator as mortgagee, would be liable to be set aside at the instance of the said mortgagor, and leave the mortgage still in existence as an unreclosed mortgage; and for these reasons it has become necessary for your orator to proceed and seek a foreclosure of the said mortgage in a court of equity, and to invoke the jurisdiction of this honorable court for that purpose." These averments are in line with the suggestions made in this connection in *Bedell v. New England Mortgage Security Company*, 91 Ala. 225, and we hold that they sufficiently show the reasonable necessity contemplated by the stipulation contained in the 5th paragraph of the mortgage to foreclose the mortgage by a decree of the Chancery Court; and this being necessary, the further necessity of employing an attorney to institute and prosecute the foreclosure suit is self-evident.

2. That Mrs. McCall was competent to bind herself and her property to the payment of attorney's fees and all other expenses of foreclosing the mortgage we do not doubt. She had been relieved of the disabilities of coverture by a decree of the chancellor "so far as to invest her with the power to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*," and the power to mortgage her real estate carried with it the power to enter into such stipulations as a part of the mortgage as are usually incident thereto; and among these may be safely classed the stipulations of this instrument for the payment by her of the costs, including reasonable attorney's fees, incurred by the mortgagee in collecting from her the money it had loaned her on the security of her land.

3. The assignment of demurrers which proceeds on the assumption that the bill does not show that the decree of the chancellor relieving Mrs. McCall of the disabilities of coverture as and to the extent provided by statute of force when this mortgage was executed was based upon a petition to that end which contained the requisite jurisdictional allegations, is misconceived. The bill does aver that Mrs. McCall, at the time of filing by next friend her said petition, owned and held as her statutory separate estate the lands embraced in this mortgage, that said petition was "in writing, averring that she was the owner of a statutory separate estate, and praying her disabilities of coverture as to her said separate estate by the decree of said court or chancel-

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lor be removed so far as to invest her with the right to buy, sell, hold, mortgage and convey her said real and personal property, and to sue and be sued as a *feme sole*," and it is further averred that her husband was made a party defendant to said petition "and, in a writing signed by him and filed in said cause, gave his assent thereto." These were the jurisdictional facts and prayer essential to the petition. Code 1876, § 2731.

4. The question raised by the assignment of demurrer which proceeds on the theory that the agent which foreign corporations are required by the Constitution to have at a known place of business in this State must be an agent who "is authorized to exercise some of the contractual powers which the corporation is empowered or permitted to exercise by its constituting instruments," and not merely an agent whose authority is limited to accepting and receiving service of process, has been determined by this court against the appellant.—*Nelms v. Edinburgh American Land Mortgage Co.*, 92 Ala. 157.

5. And so also has it several times been held that the institution and prosecution of suits in the courts of this State was not the doing of business here within our constitutional and statutory provisions requiring foreign corporations to have a known place of business, and an authorized agent or agents thereat before doing any business in this State.—*Christian v. American Freehold Land Mortgage Co.*, 89 Ala. 198; *Ginn v. New England Mortgage Security Co.*, 92 Ala. 135.

6. The fact that the mortgagors in terms waived their rights of exemption is stated in the bill, but no relief sought therein is at all dependent upon or referable to such waiver. If it be true, as is insisted by an assignment of demurrer, that the waiver of exemptions is bad as to any of the property covered by the mortgage, or as to either of the respondents, the appellant would yet take nothing by this demurrer, since, had there been no waiver or attempted waiver at all, complainants are entitled to all the relief prayed in the bill.

7. The bill not only does not show that the debt secured by the mortgage was in whole or in any part the debt of the husband, but to the contrary, it is repeatedly averred to be the debt of Mrs. McCall. The demurrers which sought immunity for Mrs. McCall and her property from liability were not only speaking demurrers but they spoke against the record.

What we have said disposes of all the assignments of
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error, which are at all insisted on in argument, adversely to the appellants. The decree of the chancellor overruling the demurrers to the bill is free from error, and is affirmed.

Brooks v. Rogers.

Statutory Action of Ejectment.

1. *Breach of the conditions of a lease; waiver of such breach.*—The acceptance by a landlord of the rents accruing after the breach of the conditions contained in a lease, with full knowledge of the breach, and of all the circumstances, is an affirmation that the contract of lease was still in force and was to continue, for the time for which the rent was paid and received; and the lessee can not be considered a trespasser during the time for which he paid rent.

2. *Same.*—The making of a contract by which the lessee released to the lessor a portion of the leased premises for a consideration which was to be credited upon subsequently accruing rent, and which was executed after the knowledge on the part of the lessor that the covenants of the lease were broken, is an affirmation of the subsistence of the lease at the time of such contract, and constitutes a waiver of the forfeiture, and right to re-enter for breach of the covenants of the lease prior to the execution of such contract.

3. *Evidence; proof of other breaches than those specified not admissible.*—Where a lessor has notified his lessee that the contract of lease has been forfeited, by reason of the breach of certain specified covenants therein, he can not, in an action founded upon such forfeiture, introduce evidence of the breach of other and wholly different covenants in the contract of lease.

APPEAL from Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This was a statutory action of ejectment, brought by the appellee, Charlotte Thompson Rogers, against the appellant, to recover certain specifically described lands, and was commenced December 7, 1891. The principal facts of the case are sufficiently stated in the opinion.

Subsequent to the alleged breach of the contract of lease, the plaintiff, together with her husband, entered into a contract with the defendant on January 22, 1891, by which they agreed to credit certain amounts upon the rent notes to be due for the years 1892 and 1893 from the said Brooks, in consideration of his relinquishing his right to 500 acres of the land, which had been originally leased to him.

Among other charges, which were asked by the defendant, and to the refusal to give each of which he separately ex-

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cepted, were the following: (12.) "The court charges the jury that the execution and delivery of the contract of January 22, 1891, made by and between the plaintiff and defendant, was a waiver by the plaintiff of all forfeitures of said lease of March 15th, 1888, which occurred prior to said 22d day of January, 1891; and if you believe from the evidence, that said contract was executed and delivered on its date, January 22d, 1891, and if you further believe that no forfeiture of said lease of March 15, 1888, was committed by said defendant after said 22d day of January, 1891, then you must find for the defendant in this cause." (13.) "The court charges the jury that if they believe from the evidence that the plaintiff was informed of the breach of said lease of March 15, 1888, on, and prior to the 1st day of October, 1891, and that on that date, the plaintiff accepted from the defendant the rent for said plantation for the year ending on the 1st day of January, 1892, and that no breach of said lease was committed by defendant after the 1st day of October, 1891, then the jury must find for the defendant in this cause."

RICHARDSON & REESE, for appellant, cited *Dahm v. Barlow*, 93 Ala. 120; *Abrams v. Watson*, 59 Ala. 524; *Mayberry v. Leech*, 58 Ala. 342; *Gomber v. Hatchett*, 6 Wis. 324; *Stuyvesant v. Davis*, 9 Paige, 427; Taylor's Landlord & Tenant, 497, 498.

ARRINGTON & GRAHAM, *contra*.

COLEMAN, J.—The suit is the statutory action of ejectment. The plaintiff in the court below, Charlotte Thompson Rogers, leased her plantation to defendant Brooks for a term of five years, to begin on the first day of January, 1889. The consideration of the lease was the annual payment of eleven hundred dollars, "to be paid on the first day of October of each year during the continuance of the lease;" and the consideration was further evidenced by the execution of five several promissory notes, in accordance with the stipulation in the lease contract. The lessee covenanted to keep the ditches, drains, fences, and houses in repair; that he would not cut down or destroy any of the wood or timber on the premises, except such as was necessary for plantation purposes, and then only from designated places, and that no land should be cleared except at a specified point. The lease provided "that, in case the party of the second part shall violate any of the conditions, covenants or stipulations

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imposed on him or agreed to by him, . . . the party of the first part, upon first giving ten days notice thereof in writing to the party of the second part, may by themselves or agents re-enter said premises, and enjoy the same in all respects as though the lease had not been made."

The lessee paid his rental notes at maturity for the years 1889, 1890, and 1891. On the 19th of November, 1891, after the payment of the rental note for that year, the plaintiff served a written notice of forfeiture upon the defendant. After setting out the covenants of the lease in regard to the cutting of timber and wood and the clearing of land, the notice proceeded as follows: "And whereas, you have violated the conditions, covenants, and stipulations above mentioned, contained in said lease, by cutting and destroying wood and timber on said premises, . . . and whereas, you have cleared wood or timber lands," setting out the place, so as to show the clearing was at a different place from that authorized by the lease, then follows the notice, as provided in the lease, that after ten days the plaintiff would re-enter, &c.

It will be observed that, in the notice served upon the defendant, there is no reference to a breach of any of the covenants of the lease in regard to the ditches, fences, and repair of buildings, but the notice places the forfeiture and right to re-enter upon a violation of the covenants in regard to the cutting and destroying of the timber and clearing of land. The suit is ejectment, and was instituted on the 7th of December, 1891, although the rent for the entire year of 1891 was paid and received by the plaintiff on the 1st of October, 1891.

The evidence tended to show that the acts complained of as a violation of the covenants of the lease not to cut or destroy the timber or clear the land occurred in December, 1890, and during the early part of the year 1891.

Under the contract of lease, the lessee held but an estate upon condition. Upon breach of covenants, he forfeited his estate at the option of the lessor, who, upon giving the notice stipulated in the contract, had the right to re-enter. The lease was not rendered absolutely void by the act of forfeiture, but upon the election of the lessor. The lessee had no option under the contract. If, after the breach of the condition of the lease, the lessor, with a full knowledge of the breach of the condition and all the circumstances, demanded and received from the lessee, under the contract of lease, rents which accrued subsequent to the breach, this was a clear recognition that the relation of

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lessor and lessee continued for the time for which the rent was paid and received. A lessor can not be permitted to get the benefit of his contract of lease after breach of condition, for the purpose of collecting rents which subsequently accrued, and, after collecting the rents, then hold the lessee to be a trespasser on the land during the same period for which he collected rents under the contract of lease. The receipt of the rent, under such circumstances, is an affirmation that the contract of lease was still in force, and subsisting up to the time for which the rent was collected, and that the lessee was not a trespasser during the time for which he paid rent. If the lessor receives rent only for the time prior to the breach of the conditions, or if the rent is received without notice or knowledge of the breach, payment under such circumstances will not constitute a waiver of his right to elect to declare the estate of the lessee forfeited, and of the right to re-enter. These principles are sustained by the following authorities: *Dendy v. Nichall*, Common Bench Rep. 4 Vol. 376, and note on page 387; *Jackson v. Allen*, 3 Cow. 220; *Munston v. Gladwin*, 6 Adolph. & Ellis, (N. S.) 952; *Stuyvesant v. Davis*, 9 Paige, 427; *Gomber v. Hatchett*, 6 Wis. 324; *Sheppard v. Allen*, 3 Taunton 77; *Bleecker v. Smith*, 13 Wend. 530; Taylor on Landlord and Tenant, §§ 497, 438.

In *Dahm v. Barlow*, 93 Ala. 120, it is said, the landlord's acceptance of the rent accruing after a forfeiture, with knowledge thereof, operates a waiver in advance of the disclaimer of title, if any.

Receipt of the rent in advance for the three months, beginning Oct. 1, 1891, and ending Jan. 1st, 1892, if received with a full knowledge that the covenants of the lease had been broken prior to that time, was a waiver of the forfeiture, and an affirmation that the relation of lessor and lessee continued under the lease, at least for the time for which the lessor received the rent in advance. We do not hold that a waiver of the forfeiture included a waiver of the right to sue and recover for a breach of the covenants. That question is not in this case. The making of a contract by and between the lessor and lessee, by which the lessee released to the lessor a portion of the leased premises, for a consideration which was to be credited upon the two rental notes of the lessee for the years 1892 and 1893, respectively, executed after covenants of the lease were broken, with full knowledge of that fact on the part of the lessor, would be an affirmation of the subsistence of the lease at the time of such contract, and constitute a waiver of the forfeiture and

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right to re-enter for breach of covenants of the lease prior to the execution of such contract.

The plaintiff was allowed to introduce evidence, against the objection of the defendant, to show that defendant had forfeited his estate by failing to keep the premises in repair as covenanted for in the contract. The lease contains such a stipulation, and it provides that for a violation of any of the covenants the lessor may re-enter, upon first giving ten days notice to the lessee. The notice given by the plaintiff to the lessee is, that "Whereas you have violated the conditions, covenants and stipulations . . . in said written lease, by cutting and destroying the wood and timber, . . . and by clearing lands," the plaintiff claims the right to rescind the lease and to re-enter the premises. Notice was never given to the defendant that the plaintiff claimed a forfeiture and right to re-enter for a breach of the covenant to make repairs. He placed the forfeiture of the leased estate entirely upon other grounds, which were carefully specified. We think this a waiver to declare a forfeiture for the breach of the covenant to make repairs. The plaintiff may sue and recover damages for the breach of the covenant in regard to repairs, but that is the exercise of a very different right from holding the lessee to have forfeited the lease estate.

In the case of *Morecroft v. Marx et al.*, 4 Barnwall & Creswell, 606, the lease contained a covenant to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant. It was held, Baily, J., "that the landlord had an option to proceed on either covenant, and, after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture." It is true in this case the landlord recovered rent for a time after the notice of forfeiture, and this was held to be an affirmation that the lease subsisted up to that time, but it was also declared as the opinion of the court, that the notice to repair within three months was a waiver of the forfeiture incurred by the breach of the covenant to keep the premises in repair.

It would be manifestly unjust to permit the plaintiff, after notifying the defendant specifically of the breaches of the covenant upon which he based the forfeiture and claimed the right of re-entry, on the trial to introduce evidence of the breach of another and wholly different covenant, of which he had given no notice and made no complaint prior to the beginning of the suit, and against which the defendant could

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not possibly prepare his defense. Objections to evidence of this character should have been sustained.

The husband can not make a contract for the sale of the lands, tenements, or hereditaments, or of any interest therein, belonging to his wife, except leases for a term not longer than one year, unless lawfully authorized thereunto in writing by his wife. Code, § 1732. Generally, without independent proof of his authority, the acts or declarations of one professing to act as the agent of another, are inadmissible against the principal.—3 Brick. Dig., 21, § 43.

There was no error in permitting the plaintiff to amend her complaint by striking out so much of the complaint as claimed damages for the detention of the land. The defendant's pleas of "set-off" and "recoupment" presented no answer to the complaint in ejectment.

It would be an unnecessary consumption of time and labor to consider in detail the many exceptions contained in the record and assignments of error. Some of them are well taken under the rules of law we have laid down applicable to the case. Many are mere repetitions, and do not raise different questions. Charge 12 is faulty, in that it ignores the fact of notice or knowledge on the part of the lessor, that the covenants of the lease had been broken, at the time of the making of the contract referred to in the charge. Other charges requested and refused are faulty upon like grounds. Charge 13 requested by the defendant was in accordance with the views we have expressed, and should have been given.

For the errors pointed out, the case is reversed and remanded.

Andrews v. Birmingham Mineral Railroad Co.

Action to recover Damages for Personal Injuries.

1. *Plea of contributory negligence may be waived.*—In an action to recover for personal injuries, where the transcript shows that only the plea of the general issue was filed, but evidence of contributory negligence was introduced, without objection, it will be presumed that the filing of a special plea of contributory negligence was waived by the plaintiff; and the appellate court will review the proceedings of the trial court as if such defense had been specially pleaded.

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2. *Evidence of custom and practice; when inadmissible.*—Custom and practice can not justify the doing of an act which is negligent *per se*; and the evidence of such a custom and practice is inadmissible.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellant against the appellee corporation; and sought to recover damages for personal injuries, alleged to have been received by reason of the defendant's negligence in not keeping its road-way in proper repair. Judgment for defendant. Plaintiff appeals; and assigns as error the rulings upon the evidence, and giving of the general affirmative charge for the defendant.

WADE & VAUGHAN, for appellant, cited *Union Railway Co. v. Alexander*, 93 Ala. 133; 9 So. Rep. 526; *Railroad Co. v. Orr*, 94 Ala. 602; 8 So. Rep. 864; *Daniels v. Hardwick*, 88 Ala. 558.

HEWITT, WALKER & PORTER, *contra*, cited *Railroad Co. v. Schaufler*, 75 Ala. 136; *Thompson v. Railroad Co.*, 26 N. E. Rep. 1070; *Dandie v. Railroad Co.*, 7 So. Rep. 792.

HEAD, J.—Appellant was a brakeman in the service of appellee. As the locomotive drawing one of appellee's trains approached a switch on the main line in the company's North Birmingham yard, he was standing on the foot braces on the pilot of the locomotive, which were twelve or fifteen inches long and were intended for brakemen to stand on when switching. It was ten o'clock at night. When about forty feet from the switch appellant says he saw it was thrown wrong for the train, and was ready to jump, when the engineer called, "Andrews, look out for that switch." He then jumped on the track in front of the engine and took three steps towards the switch, when his leg went into a hole in the road-bed and he fell. The engine was moving at the rate of from three to five miles per hour and slowing up when he jumped off. By reason of the fall, he was overtaken by the engine, run over and injured. The hole into which he fell, averaged at least three feet deep for the distance of eleven cross-ties, and looked, appellant testified, like a trestle had been there. Appellant had never seen the hole before and did not know it was there until he fell into it. He examined it afterwards. The testimony also tended to show that where he jumped off, and thence in the direction of the switch, the track was on an embankment which sloped off on the right side; that on the right there were two other

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tracks about six feet apart, and the embankment, on which was the main track, outside of rails of track was covered with hunks of slag and cinder, some of which weighed probably 150 or 200 pounds. On the left of the track it was narrow, being about two feet wide and nearly perpendicular. Switch was on the left side. The road-bed, between the rails, where appellant undertook to go in advance of the engine, was apparently level. There was no light there, except the headlight of the engine and appellant's lamp which he had with him. It was appellant's duty to attend to switches for that train on the occasion in question. There was other evidence tending to show negligence on the part of the defendant company, in respect to the existence of the hole in the roadway.

The cause of action relied on is the defective condition of the roadway, in that the hole in which appellant fell was negligently permitted to be and remain therein. The defense relied on is contributory negligence. That defense was not specially pleaded, but the parties, without objection, actually tried the case upon that issue, which brings it within the rule announced by this court in *Farmer's Case*, 97 Ala. 141. The filing of the special plea was thus waived by the appellant. The special act, on the part of appellant, insisted on by the defendant as constituting contributory negligence, was the act of jumping off on the track in front of the moving engine and undertaking to go upon the track to the switch. As pertinent to the inquiry, whether such conduct on his part was negligence or not, he offered to prove by his own testimony that it was the custom and practice on defendant's road and on well regulated railroads for brakemen, when doing switch work in the yard limits, to stand and ride on the pilot of the engine and to leave the pilot to do switching before the engine came to a full stop; and to show it was the custom and practice of engineers on defendant's railroad and well regulated railroads not to bring their engines to a full stop for brakemen to leave the pilot when doing switch work. The court sustained an objection to the introduction of this testimony, and appellant excepted.

In *Warden v. L. & N. R. R. Co.*, 94 Ala. 277, we used this language: "The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is a negligence *per se* for persons to walk on the track of railroads; doubtless many

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persons are in the habit of using the track in this way. Yet it has never been supposed, and it can not be the law, that such custom would convert the track which the law declares to be *per se* a dangerous place, into a safe place. . . . Custom and usage may be relied on to excuse the violation of a rule, when the act involved is not negligent itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to, as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent." A number of authorities are there cited in support of what was said.

In *K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 240, the law in reference to the admissibility of custom and usage of railroads, as affecting the question of negligence, is also fully stated, to which we refer without quoting.

Under the evidence in this cause, we are of opinion that the plaintiff's conduct in attempting to go to the switch on the track in front of the moving engine, under the circumstances detailed by himself, involved obvious peril of his safety, and was *per se* negligence, which, under the principles declared in *Warden v. L. & N. R. R. Co.* and *K. C., M. & B. R. R. Co. v. Burton*, *supra*, could not have been relieved by proof of the custom which he offered to introduce. It follows that, conceding the existence of such a custom, the defendant was entitled to the general affirmative charge which the court gave. The judgment of the City Court is affirmed.

Jones v. Weakley.

Action for Money had and received.

1. *Gifts causa mortis*.—To constitute a valid gift *causa mortis* the donor must part with possession and all present control over the thing given, must do that which shows conclusively such intention, and the delivery must be as complete as the nature of the property will allow.

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2. *Same; savings bank book*.—A delivery by the donor to the donee of a savings bank deposit book, standing in the name of the donor, is a complete and valid gift *causa mortis* of the deposit, if such was the intention of the donor.

3. *Same; pass book of ordinary bank*.—A delivery of a pass book of an ordinary bank is not sufficient to constitute a valid gift *causa mortis* of the money on deposit, since the depositor does not, thereby, lose control over the deposit, and it was not the best available delivery of such deposit

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This suit was brought by the appellant, John H. Jones, against the appellee, S. D. Weakley, as administrator of the estate of Nat Jenkins, deceased, for money had and received. The facts of the case are sufficiently stated in the opinion. The cause was tried by the court without the intervention of a jury; and upon the hearing of the evidence the court rendered judgment for the defendant. The plaintiff prosecutes this appeal, and assigns as error the rendition of said judgment.

WHITE & HOWZE, for appellant.—The delivery of a savings bank book is a valid gift *causa mortis* if such was the intention of the donor.—*Pearce v. Boston*, 37 Amer. Rep. 370; *Hill v. Stevenson*, 18 Amer. Rep. 231; *Curtis v. Portland*, 52 Amer. Rep. 750. Not being able to find any case holding that the delivery of a deposit book of a bank other than a savings bank is a valid gift *causa mortis*, or holding to the contrary, the question can only be settled upon principle and by analogy. It has been fully settled that promissory notes, bonds and other evidence of indebtedness, which may be regarded as representatives of debt are subjects of a parol gift, and the delivery thereof constitute a valid gift *causa mortis*. 3 Redfield on Wills, 335; *Tillinghast v. Wheaton*, 5 Amer. Rep. 621. The deposit book in this case was a contract on the part of the bank to repay the money loaned, or any part thereof on demand. It was an evidence of indebtedness, and as such its delivery by the owner would be a valid gift *causa mortis*, if such was the intention of the donor. The fact that the amount of the debt is uncertain can not affect this principle. The donor gives just what the bank owes him, and the donee accepts just so much, and this amount can be ascertained by proof. The mere fact of the donor's still having the right to draw on the amount deposited in the bank can not invalidate the gift, for in doing so he commits a wrong upon the donee, and this he has no right to do. The retention to invalidate the gift must be of the right to

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control the same.—*Amis v. Witt*, 33 Beavan, 619; *Thomas v. Lewis*, 15 S. E. Rep. 389.

CABANISS & WEAKLEY, *contra*.—1. Gifts *causa mortis* are not favored in the law, and in order to establish such a gift the proof must be clear and unmistakable.—19 Cen. Law. Jour. p. 222, and cases there cited; *Hatch v. Atkinson*, 56 Me. 324; s. c. 96 Amer. Dec. 464. 2. To constitute a valid donation *causa mortis*, there must be a delivery of the thing given and an acceptance of the gift by the donee. The donor must part not only with the possession, but with all present control and dominion over the property.—*Baskett v. Hassell*, 107 U. S. 602; s. c. 27 Law Ed. 500, and notes; *Ridden v. Thrall*, 11 Law Rep. Ann. 684 and notes; *Henschel v. Maurer*, 69 Wis. 570; s. c. 2 Am. St. Rep. 757, and note 759; 8 Amer. & Eng. Encyc. of Law, 1347, and note 3. 3. The delivery of a pass book of an ordinary bank of deposit is not sufficient to perfect a gift of the money on deposit, since the depositor does not thereby lose control and dominion over the deposit. 8 Amer. & Eng. Encyc. of Law, p. 1345, note 2; 2 Schouler Pers. Prop., §§ 172, 173; *Beak v. Beak*, L. R. 13 Eq. 489; *McGonnell v. Murray*, 3 Ired. Eq. R. 460; *Ashbrook v. Ryan* (Ky.), 92 Amer. Dec. 481; *Appeal of Walsh*, (Pa.), 9 Amer. St. Rep. 83; *McHugh v. O'Conner*, 91 Ala. 241. 4. The same acts are necessary to constitute a delivery in a gift *causa mortis* as in a gift *inter vivos*.—8 Amer. & Eng. Encyc. of Law, p. 1314, and authorities cited in note 6. 5. The delivery must be as complete as the nature of the property will admit of.—*Hatch v. Atkinson*, *supra*; *Smith v. Downey*, 3 Ired. 268; *Miller v. Jeffress*, 4 Gratt. (Va.), 472; *Ward v. Turner*, 2 Ves. 431; *Westerloo v. De Witt*, 36 N. Y. 340.

STONE, C. J.—This case was tried by the court without a jury, and presents a single question: Does the testimony prove that the deceased, Nat Jenkins, made a valid, executed gift *causa mortis* to John H. Jones, the plaintiff, of the money he had on deposit with the First National Bank of Birmingham? There is no material conflict in the testimony.

The First National Bank of Birmingham was a bank of issue, discount and deposit, and was not a savings bank. Nat Jenkins was a colored man, was lying seriously wounded from a railroad disaster; believed he would die of his wounds, and did in fact die therefrom two days afterwards. He had a deposit account with the First National Bank. He had in his possession a pass book, in which was an account with the caption, "Dr. The First National Bank in ac-

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count with Nat Jenkins, Cr." In this pass book were items of debit and credit, but the account was not balanced. There was in fact a balance due the depositor of near nine hundred dollars.

Jones was nephew of Jenkins, and was visiting the latter as he lay in the hospital, the effect of his injuries. He gave Jones the key to his box, and requested him to go and bring to him his pass book and other articles. On the next day, and in the presence of witnesses, Jenkins, after stating he was going to die, "handed to plaintiff (Jones) the bank book, keys and papers, and said to him: . . . take this book. I give you this money and all I have got—go and get it. I don't want the old man, or any of his folks, to have any thing that I have got. All I want is for you to see that I am decently buried." Jones took possession of the tendered pass book, keys and papers, and retained them. After Weakley was appointed administrator, he checked the money out of the bank, and this action was brought by Jones to recover the same as so much money had and received for his use.

The general rule is, that to constitute a valid gift, whether *inter vivos*, or *causa mortis*, the donor must part with dominion over the thing attempted to be given; must do the act or acts which are, or appear to be, the most pronounced and decisive of the intention to part with possession and control; and the acts must of themselves amount to a parting with the possession and control. Authorities on this question are very abundant, and they cover almost every conceivable phase of the question.—*McHugh v. O'Connor*, 91 Ala. 243; *Dacus v. Streety*, 59 Ala. 183; 8 Amer. & Eng. Encyc. of Law, 1341 *et seq.*; and the numerous authorities cited by counsel.

The direct question presented by this record has been many times considered. A pass-book issued by a savings bank, it is held, rests on a peculiar footing. Such book is the record of the customer's account, and its production authorizes control of the deposit. Like the key of a locked box, its delivery is treated as a delivery of all it contains. It follows that the delivery in this case, accompanied by the declared intention to give, if the deposit had been in a savings bank, would have been a valid gift *causa mortis* of the money on deposit, of which it was the evidence. It would furnish the key to the locked contents. 8 Amer. & Eng. Encyc. of Law, 1824-5; *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; 37 Amer. Rep. 371; *Curtis v. Portland Savings Bank*, 77 Me. 151; 52 Amer. Rep. 750; *Hill v.*

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Stevenson, 63 Me. 364 ; 18 Amer. Rep. 231 ; *Camp's Appeal*, 36 Conn. 88.

Not so, however, with the present book. The First National Bank, as we have seen, was a bank of issue, discount and deposit. The money could be withdrawn from the bank, not by the production of the pass-book, but on the check of the depositor. It was not the best delivery available under the circumstances. It did not give dominion and control of the money, the thing claimed to have been given ; for the money was as subject to check without the production of the book as with it.—*Thomas, Admr. v. Lewis*, 15 S. E. Rep. 389 ; *Dole v. Lincoln*, 31 Me. 422 ; *Hillebrant v. Brewer*, 6 Tex. 45 ; *Noble v. Smith*, 2 Johns. 52 ; *Jones v. Brown*, 34 N. H. 445 ; *Beak v. Beak*, L. R. 13 Eq. Cas. 489 ; 8 Am. & Eng. Encyc. of Law, p. 1345, note 2.

There is no error in the record.

Affirmed.

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Bill in Equity to Invest Legal Title in Complainant.

1. *Petition for sale of land to pay decedent's debts; sufficient averments.*

—A petition by an administrator for an order to sell lands belonging to the estate of his intestate, for the payment of his debts (Code, §§ 2104, 2106), which alleges that "there is no personal property belonging to said estate with which to pay the debts of said decedent, and that it is necessary to sell the said lands to pay the debts of said estate," is sufficient to confer jurisdiction on the Probate Court to decree a sale.

2. *Bill in equity to invest legal title; want of equity.*—Where the averments of a bill, filed to invest the legal title in complainant, on the theory that he claims as the purchaser under a void sale, show that the allegations of the petition for such sale were sufficient to confer jurisdiction to order a sale, the bill is without equity, the said sale having been valid, and having invested the purchaser with the legal title.

APPEAL from Chancery Court of Cleburne.

Heard before Hon. S. K. McSPADDEN.

The bill in this case was filed by the appellee, James F. Brannon, against the appellants, the heirs of A. H. Smith, deceased, and prayed for the divestiture of title to certain property described therein out of the respondents, and the investing of such title into the complainant. The theory of the bill and the facts as disclosed in the record are sufficient—

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ly stated in the opinion. The respondents demurred to the bill as several times amended, and assigned in various ways the want of equity in said bill; and also moved to dismiss the bill for the want of equity.

Upon the submission of the cause, upon pleadings and proof, the chancellor overruled the several grounds of demurrer and the motion to dismiss, and in his final decree granted the relief prayed for. The respondents prosecute this appeal, and assign as error the decree overruling their demurrers and motion to dismiss, and the final decree granting complainant the relief asked.

PARSON, PEARCE & KELLY, and WATTS & SON, for appellants.

SMITH & SMITH, *contra*.

MCCLELLAN, J.—The theory of the bill of complaint in this case is that the complainant, James F. Brannon, is a sub-purchaser under a void sale of the land in controversy, which belonged originally to A. H. Smith, now deceased, made by the administrator of said Smith in 1872; that the purchaser at that sale, under whom complainant claims, paid the purchase-money in full, that this money was received by the heirs of said Smith, who are defendants to the bill, and appropriated and used by them or for their benefit, and that upon these facts, the complainant is entitled to have the legal title, which the void sale was inoperative to pass, divested out of them and invested in himself. The supposed infirmity of the sale by the administrator of Smith is alleged to lie in the insufficiency of the petition, filed by him in the Probate Court for an order of sale, to confer jurisdiction on that court to make such order. The bill as amended avers the contents of said petition as follows: "The said H. W. Moore, as the administrator of the said A. H. Smith, filed his written application with the Probate Court of Cleburne county [in which the land was situated], alleging that there was no personal property belonging to said estate with which to pay the debts of said decedent, and that it was necessary to sell said lands to pay the debts of said estate." In *Abernathy v. O'Reilly*, 90 Ala. 495, this court held the averments stated above in a petition by an administrator to sell the lands of his intestate to be insufficient to confer jurisdiction on the Probate Court to decree a sale, and, of consequence, that an order made by the court on such a petition and the sale thereunder were absolutely void. Doubtless the present bill was framed with reference

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to that decision; and if that case were now the law, the bill would be sustained, at least so far as its equity rests upon the invalidity of the administrator's sale. But the doctrine declared in *Abernathy v. O'Reilly* is not now the law of this State. That case has been directly and expressly overruled, and the law declared to be that an application by an administrator to sell lands belonging to the estate of his intestate, which alleges that there is no personal property or an insufficiency of personal assets, to pay the debts of the decedent, and that a sale of the lands of the estate is necessary to pay said debts, contains the essential jurisdictional allegations as to the existence of debts, the insufficiency of personal assets for their satisfaction, and the necessity for a sale of the lands of the estate to that end, and confers jurisdiction on the court to decree a sale. *Cotton, Admr. v. Holloway*, 96 Ala. 544.

It is manifest, therefore, that upon the averments of this bill the complainant now has what he seeks to acquire through the decree he prays, namely, the legal title to the land in controversy; and it follows of course, that the bill is without equity, and the chancellor erred in overruling the motion of respondents to dismiss it out of court on that ground.

Whether on the facts shown in the record before us equity could be injected into the bill by amendment, it is not necessary or proper for us to decide on this appeal.

The decree of the Chancery Court is reversed and the cause remanded.

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Bill in Equity to Ratify and Confirm Sale under a Power Contained in a Mortgage.

1. *Petition of married woman to be relieved of the disabilities of coverture; when sufficient.*—A petition to be relieved of the disabilities of coverture, which avers that the petitioner is a married woman, of lawful age, and the owner of a statutory separate estate, that she has sustained losses by fire, and in order to re-build it is necessary to mortgage such estate, and which prays "that she be decreed a *feme sole*, for the purposes of, and so far as to invest her with the right of, executing a mortgage on her statutory separate estate, and for such further and other relief as the nature and equity of this case, and the statute for such cases made and provided, will allow," is sufficient to support a decree relieving her of the disabilities of coverture, in accordance with the statute then existing —(Code of 1876, § 2781).

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APPEAL from Decatur City Court, in equity.

Heard before the Hon. W. H. SIMPSON.

The bill in this case was filed by the appellee, William Moseley, against the appellant, Mrs Martha A. Black, on Oct. 26, 1891; and prayed that a foreclosure sale under a mortgage, at which the complainant became the purchaser, be ratified and confirmed, or at the option of the defendant, the mortgagor, that a resale be made.

The allegations of the bill disclose substantially the following facts: Mrs. Martha A. Black, a married woman, filed a petition in the Chancery Court of Morgan county, Alabama, on October 16, 1881, praying that she be decreed a *feme sole* for the purpose of executing a mortgage of her statutory separate estate, and for such other and further relief as was allowed under the statute then in force. On October 19, 1881, her husband filed in said court his written assent that the prayer of said petition be granted. The averments of this petition are sufficiently stated in the opinion. On October 21, 1881, the following decree was rendered in said court: "It is ordered, adjudged and decreed by the chancellor, that Mrs. Martha A. Black, wife of William B. Black, be and she is relieved of the disabilities of coverture as to her statutory or other separate estate, so far as to invest her with the right to buy, sell, hold, convey and mortgage, real and personal property, and to sue and be sued as a *feme sole*."

On November 1, 1881, Mrs. Black, being indebted to one Hiram S. Freeman in the sum of \$2,000, evidenced by two promissory notes, payable one and two years after date, to secure the payment of the same, executed a mortgage on certain described property. On January 31, 1887, the said Freeman transferred and assigned said notes and mortgage of Mrs Black to the complainant in the present action, William Moseley. The notes not being paid, William Moseley, as the assignee of said Freeman, after giving proper notice by advertisement, on March 31, 1891, sold the property embraced in the mortgage, and at said sale he became purchaser thereof; and as such purchaser now files the present bill, praying the relief stated above.

The respondent demurred to the bill on the ground, that the complainant did not offer to do equity by offering to account for the rents and profits of the property described in the bill, since the same had been in his possession; and assigned as further grounds, that the petition set forth as an exhibit to the bill was not sufficient to give the Chancery Court jurisdiction of the matter of relieving Mrs. Black of

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the disabilities of coverture, and that the decree on said petition does not follow the requirements of the statute; and that, therefore, the mortgage, at the foreclosure sale of which the complainant became the purchaser, was null and void, as having been executed by a married woman while under the disabilities of coverture. These demurrers were overruled. The respondent now appeals, and assigns as error the decree overruling her demurrers.

KYLE & SKEGGS, for appellant.

HARRIS & EYSTER, *contra*.—It was not incumbent upon the complainant in this bill to offer to pay or account for the rents.—*McHan v. Ordway*, 76 Ala. 347; *McLean v. Presley*, 56 Ala. 211. The petition to be relieved of the disabilities of coverture was sufficient to support a decree granting the relief prayed for.—*Powell v. N. E. M. S. Co.*, 87 Ala. 602; *Meyer v. Sulzbacher*, 76 Ala. 120; *Mohr v. Senior*, 85 Ala. 114.

COLEMAN, J.—The only material question presented by the record is, as to the validity of the decree of the chancellor, proceeding under section 2731 of the Code of 1876, by which the plaintiff was relieved of certain disabilities of coverture. The decree of the chancellor is in precise accord with the statute. The contention arises upon the sufficiency of the petition, upon which the decree was rendered. The petition states "that she is a married woman, the wife of William B. Black, that she is of lawful age," and states the place of her residence. It avers ownership of a statutory separate estate which is particularly described. The petition then states that she has sustained losses by fire, and in order to rebuild, avers that it has become necessary to mortgage her statutory estate to borrow money. The prayer is, "that she be decreed a *feme sole* for the purpose of, and so far as to invest her with the right of executing a mortgage on her statutory separate estate, and for such further and other relief as the nature and equity of this cause, and the statute in such cases made and provided, will allow," &c. The assent of the husband conforms to the prayer for relief.

The only question is, whether the petition and decree bring the case within the influence of the case of *Powell v. New England Mortgage Security Co.*, first reported in 87 Ala. 602; 6 So. Rep. 339, and subsequently in 94 Ala. 423; 10 So. Rep. 324, and other cases which hold that the relief prayed for and that granted must conform strictly with the statute.

In the *Powell Case*, *supra*, it was considered, that the peti-

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tion admitted of but two constructions, either of which rendered it obnoxious to the statute. First, that the petition prayed for relief only so far as to authorize the wife to execute a mortgage upon her statutory estate; and, if not given this construction, then it was that she be relieved from "all disabilities of coverture." Neither construction of the petition gave the court jurisdiction to render the decree, and it was held to be void. Under one construction only partial relief was prayed for, and under the other, more relief, than was authorized by the statute. Authorities are cited in the opinion.

The fact that the petitioner asked for particular relief so as to invest her with the power to mortgage her estate, can not operate to her prejudice, or the jurisdiction of the court, when the prayer for the particular relief is followed by a prayer for all the relief, and no more, nor less, than that provided by the statute, and which general relief, if granted would include the particular relief prayed for. The principles of law declared in the *Powell Case*, 94 Ala. 423; s. c. 10 So. Rep. *supra*, and general rules of equity, sustain this proposition.—*Mohr v. Senior*, 85 Ala. 114; *Falk v. Hecht*, 75 Ala. 293; *Meyer v. Sulzbacher*, 76 Ala. 120.

The decree of the chancellor relieving the appellant of the disabilities of coverture was founded on a sufficient petition, and the decree itself is in accordance with the statute, and must be held to be a valid decree. After its rendition, the appellant was competent to execute a mortgage. The demurrer to complainant's bill was properly overruled and, the decree of the City Court is affirmed.

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Action to recover Damages for Breach of a Contract of Sale.

1. *Charge to the jury.*—A charge, which, in effect, asserts no more than that, if the plaintiff has established, to the satisfaction of the jury, the material averments of the complaint, he is entitled to recover, is not erroneous.

2. *Breach of contract; measure of damages.*—In an action for the breach of a contract not to engage in a certain business, the fact that in the purchase-price paid by plaintiff there was included the value of an unexpired license to conduct such business issued to the defendant, constitutes no element of damage, and can exert no influence upon

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the question of the extent and amount of damage suffered by plaintiff by reason of the breach complained of.

3. *Same.*—In an action to recover for the alleged breach of a contract, entered into by defendant on selling his business to plaintiff, in which he agreed not to carry on a similar business in the same town, evidence that plaintiff's business had fallen off greatly after defendant opened up at another place in the same town, and that defendant's old customers returned to him, furnishes no *data*, by which the jury could possibly arrive at the amount of plaintiff's damages; and on such evidence he can only be entitled to nominal damages.

5. *Charges to the jury.*—Charges which assert that "when plaintiff and defendant each testify in a case and contradict each other on material points, and neither is corroborated by other circumstances or evidence, and are equally credible and worthy of belief, the verdict should be for the defendant, are erroneous."

5. *Same.*—A charge predicated on a fact unsupported by the evidence in the case is erroneous.

6. *Same.*—A charge which asserts that if there is "doubt and uncertainty" as to a fact which it is incumbent on the plaintiff to prove, then such fact must be regarded as not established, and the issue must be found against the plaintiff, exacts too high a measure of proof, and is erroneous.

APPEAL from Circuit Court of Morgan.

Tried before the Hon. H. C. SPEAKE.

This action was brought by William T. Taylor against Frank A Howard, to recover damages for the alleged breach of a contract of sale; and was commenced on March 14, 1887. The complaint as originally filed contained but one count, which was demurred to by the defendant, the demurrer containing six grounds. The court sustained the first, fourth and fifth grounds of this demurrer, and overruled the second, third and sixth grounds. Thereupon the plaintiff amended his complaint by adding another count, in which the plaintiff claimed \$1,400.00 for the breach of a contract made between him and the defendant. The substance of this contract, as stated in the amended complaint, and the breach complained of are as follows: The defendant sold to the plaintiff for \$1,400.00 in cash his bar and fixtures, lease of a certain house and lot in Decatur, Alabama, and his good will in said business in said town; and contracted and agreed to remove his stock of liquors from said town of Decatur, and to treat the license under which he, the defendant, carried on the retail liquor business in Decatur, as a nullity, and not to carry on said business under said license in said town; and that the defendant failed to perform his part of the contract in this: 1st. He has failed to remove his stock of liquors out of said town, and is now carrying on a retail liquor business as before. 2d. He failed to give to the plaintiff his good will in the business sold. 3d. He failed to treat said license as a nullity. 4th. He has failed to ab-

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stain from carrying on the retail liquor business in the town of Decatur. To this complaint the defendant pleaded the general issue, and upon issue formed thereunder the trial was had.

The plaintiff in his own behalf testified that he purchased from defendant his bar and fixtures and the good will of his business, and that in said contract of sale the defendant agreed not to engage in the retail liquor business in the town of Decatur, and to remove his stock of liquors from said town; that he further agreed to cancel and give up the license, which had been granted him to carry on said business; that these considerations entered into the contract of sale, and were the inducements for the plaintiff to give to the defendant the purchase price, \$1,400.00, the bar and fixtures not being worth that much; and that as part of the \$1,400.00 paid the defendant, there was included the value of his unexpired license, which was estimated at \$350.00.

The testimony for the defendant was in conflict with that of the plaintiff. He testified in his own behalf that he did not contract not to engage in the retail liquor business in Decatur, after the sale to the plaintiff. It was shown by the evidence of both plaintiff and defendant that a short time after the sale to the plaintiff the defendant again began business as a retail liquor dealer in the town of Decatur; and the plaintiff testified that "his business fell off very greatly after Howard opened up on the corner of Bank and Market Streets, and that Howard's old customers followed him to that place, and did not deal with the plaintiff."

The court, at the request of the plaintiff, gave to the jury the following written charges: (1.) "If the jury are reasonably satisfied from the evidence that there was a sale of the good will and other articles mentioned in plaintiff's complaint by the defendant to the plaintiff, and the defendant agreed not to enter the same business in Decatur, then your verdict must be for the plaintiff, if you find that the defendant did again engage in the same business in Decatur." (2.) "If the jury believe from the evidence that Taylor paid Howard the value of the unexpired license for the time they were taken out, and if the jury further find from the evidence that in the contract of sale Howard agreed not to do business under said license, and that he did do business in Decatur under said license, then the amount so paid by Taylor to Howard would be an element of damage for which the jury may return a verdict for the plaintiff." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give

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each of the following written charges requested by him :

(1.) "Nominal damages in this case would be six cents, or other inconsiderate sum." (2.) "You are bound to weigh the testimony of both Howard and Taylor and give it such credence as you think it entitled to. You must reconcile it if you can, and if you can not reconcile it, then your verdict should be for the defendant." (3.) "When plaintiff and defendant each testify in a case, and contradict each other on material points, and neither is corroborated by other circumstance or evidence, and are equally credible and worthy of belief, then your verdict should be for defendant." (4.) "If you believe the witnesses are equally credible and equally worthy of belief, then the plaintiff in this case has not established his case by that measure of proof which the law requires, and your verdict should be for defendant." (5.) "If you believe from the evidence that Taylor made a hard bargain and the defendant a good bargain, then the plaintiff Taylor can not be reimbursed in this action for the amount of difference between a reasonable value of the articles purchased and the contract price." (6.) "If you believe from the evidence that there was a sale of the license by Howard to Taylor, this would have been a sale contrary to law, and plaintiff could not recover for it." (7.) "The use of the license by Howard entailed no loss upon Taylor, and for said use Taylor can not recover." (8.) "I charge you, gentlemen of the jury, that there is no evidence before you of any damage sustained by plaintiff by reason of defendant again engaging in business." (9.) "If you believe from the evidence that there is doubt and uncertainty in the question of the sale of the good will by Howard to Taylor, then the fact of the sale of the good will must not be regarded as established, and the issue must be found against the plaintiff." (10.) "The burden of proving that there was a sale of the good will in this case is upon Taylor, and if you believe that the evidence is equally balanced on this point and the witnesses are equally credible, your verdict must be for the defendant."

HARRIS & EYSTER, for appellant.

No counsel marked for appellee.

HEAD, J.—When the court sustained several of the grounds of the demurrer to the original complaint, that complaint, not being amended, necessarily went out of court. The fact that the court overruled the second, third and sixth

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grounds of the demurrer can be regarded as no more than a suggestion to the parties that the objections specifically urged by those assignments were not well taken. The case was therefore tried on the new count which was filed by way of amendment. The overruling the three grounds of demurrer can not be assigned as error here.

There was no error in the first charge given by the court at the instance of the plaintiff. The complaint sets forth a good cause of action. This charge, in effect, asserts no more than that if the plaintiff has established, to the satisfaction of the jury, the material averments of the complaint, he is entitled to recover.

The second charge given for plaintiff was erroneous. The theory of the plaintiff's case is that he purchased the bar and fixtures and lease from defendant, together with the good will of the business defendant was then carrying on, and in consideration thereof paid him \$1,400.00, and defendant agreed not to engage in similar business in Decatur. In estimating the value of this purchase, and determining the contract price, it was considered that defendant had expended \$350.00 for a license to engage in the business being disposed of, and allowance was made therefor, by way of addition to the value of the goods; and, according to plaintiff's contention, the license was to be cancelled and not to be used again. The transaction in reference to the license was no more than an element entering into, and considered by the parties in the determination of, the value of the purchase plaintiff was negotiating for, and the price he should agree to pay, and into the agreement defendant made, if he made such, not to again engage in the like business. There was no sale and purchase of the license. There could have been none. This is not an action for breach of a contract of sale of the license. No such action would lie. The case, from plaintiff's stand point, is simply one of a purchase of the fixtures, &c. at the gross agreed price of \$1,400, defendant agreeing to abstain from engaging in a competitive business. This is demonstrated by the complaint itself. The amount paid therefor can exert no influence upon the question of the extent and amount of damage plaintiff suffered by the breach of the agreement not to again engage in business. Those damages must be determined by other criteria.

The only evidence touching the measure of damage plaintiff sustained by reason of the alleged breaches, is contained in his statement, as a witness, that "his business fell off very greatly after Howard opened up on the corner of
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Bank and Market Streets, and that Howard's old customers followed him to that place and did not deal with the witness." It is perfectly manifest that this furnishes no *data* by which the jury could possibly arrive at the amount of plaintiff's damage. The proof must go further than this, in order to recover more than nominal damages. 1 Sedg. on Damages, (8th Ed.), §§ 182, 254. The first, fifth and eighth charges requested by defendant, should, therefore, have been given.

The second, third and fourth charges incorrectly state the rule as to burden of proof. They are efforts to state the general rule that where all the evidence which favors the plaintiff and all which favors the defendant are found, when considered together, to be equally balanced, the jury must find against the party on whom rests the burden of proof; but they fall short of it for reasons too obvious to require discussion.

Charge six requested by defendant was properly refused. There was no sale of the license.

Charge seven is tantamount to saying that, if defendant carried on the business which it is alleged he agreed not to carry on, the plaintiff can not recover. It was properly refused. If the plaintiff proved his case to the satisfaction of the jury he was entitled to recover nominal damages, there being no evidence of substantial damage.

We have recently decided, in several cases, that charge nine exacts too high a measure of proof. It was properly refused.

Charge ten pretermits all right of recovery by plaintiff for the alleged breach not to again engage in the business in Decatur, and was properly refused.

For the errors mentioned, the judgment is reversed and the cause remanded.

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Bill of Review.

1. *Variance; relief can not be granted without allegations.*—Relief can not be granted for matters not alleged, although the evidence may disclose a right to recover; and hence, if, in a suit in equity to foreclose a mortgage, the individual members of a partnership are made parties defendant, but not in their partnership names,

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and the bill, neither in its averments nor prayer, seeks to enforce the collection of an indebtedness from said firm, a decree against the firm is erroneous, and a bill to review and annul said decree is maintainable.

APPEAL from the Chancery Court of Crenshaw.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by Rufus Cook, on November 10, 1890, against R. E. Bolling & Son; and sought to have reviewed and set aside a decree rendered in a suit brought by the said Bolling & Son, against W. H. Cook, Jefferson Cook, the complainant, and other defendants.

In his bill of complaint the complainant averred that on April 27, 1887, R. E. Bolling & Son, filed their bill of complaint against complainant, W. H. Cook, Jefferson Cook, Martha Cook and W. T. Trantum, "for the purpose of foreclosing a mortgage made by W. H. Cook and Jefferson Cook, and to have a deed made by said Jefferson Cook and Martha Cook, declared fraudulent and void as to said creditors;" that the firm of Cook Bros., composed of the complainant and W. H. Cook, was not made party defendant to the said bill of complaint; that it was alleged in said bill of complaint that the said firm of Cook Bros. was indebted to R. E. Bolling & Son, at the time of making the mortgage by W. H. Cook, (which was sought to be foreclosed); and that it was also alleged and shown in said bill of complaint that the mortgage was given to secure the payment of money which was borrowed by Jefferson Cook, for the purpose of paying up the said sum due from Cook Bros. to R. E. Bolling & Son, and also to secure the payment of an additional sum borrowed by Jefferson Cook; that upon the execution of said mortgage by W. H. Cook, the firm of R. E. Bolling & Son, delivered to W. H. Cook, the notes which evidenced the indebtedness due to them by Cook Bros.; and that these notes were marked "paid" on the face of them. The bill then avers that on July 20, 1888, the chancellor rendered a decree dismissing the bill of Bolling & Son, "for all purposes except the Pace lands, and to foreclose the mortgage executed by W. H. Cook to R. E. Bolling & Son;" and that on January 24, 1890, the chancellor rendered a final decree in said cause, and sets out that part which has special reference to the firm of Cook Bros. which is copied in the opinion of this court on the present appeal. The prayer of the bill was for a decree declaring that said final decree in the original cause of R. E. Bolling & Son against W. H. Cook, *et al.* be reviewed, reversed and held for naught. By amendment W. H. Cook, was made

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a party complainant. The defendants demurred to the bill on the following grounds: 1st. That there was no equity in the bill, because the error of law, if there be any, as averred in the bill, could have been reached by demurrer and cured by amendment. 2d. Because if the proceedings were irregular, in not making Cook Bros., as a firm, parties defendant to the complaint, complainant should have demurred to the bill, or have made a motion to dismiss it. 3d. There is no error of law apparent on the face of the decree as shown by the bill. 4th. The complainant had a clear right of appeal, and can not now be benefitted by his *laches*. 5th. The bill made the individual members of the firm of Cook Bros. parties, and the court could have properly rendered a decree against the partnership firm on the pleadings and the testimony of the case. 6th. There is no equity in the bill, because, if there was an amendable defect in the original bill, no demurrer was interposed and no objection made, and that, therefore the court very properly considered such an amendable defect cured by a submission without objection to the alleged defect.

Upon the submission of the cause upon the demurrers filed to the bill as amended, the chancellor sustained the demurrers; and the complainants bring the present appeal, and assign as error this decree of the chancellor.

L. H. PARKS and GARDNER & WILEY, for appellants.

GAMBLE & BRICKEN, and D. M. POWELL, *contra*.

STONE, C. J.—The transcript in this case is, of itself, very incomplete. It fails to fully explain the point presented for our consideration. There is an agreement, however, that the transcript in another case pending in this court may be consulted in connection with the present one. That transcript contains the entire record of the suit, which the case in hand seeks to have reviewed on an allegation of error apparent. This agreement is signed by counsel, and is certified as a part of the record in this case. There is a grave objection to this practice. It imposes on the court additional labor, and may lead to great confusion. But we will make no specific ruling on this question at this time.

We have consulted the record in the case referred to. It was a bill by R. E. Bolling & Son against W. H. Cook, Rufus Cook, Jefferson Cook and other defendants. Its purpose was to enforce the collection of a debt secured by a mort-

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gage, and by certain other securities and collaterals. The claim sought to be enforced was a debt secured by note, dated Jan. 8, 1885, and due Jan. 1, 1886, for nine hundred and thirty-four dollars, with waiver of exemptions. The averment of the bill in reference to the execution of that note is as follows: "That orators . . . agreed to loan, and did actually loan them the sum of nine hundred and thirty-four dollars, and to secure the same took the note and mortgage and transfer of accounts from Wm. H. Cook and Jefferson Cook." The note was signed by W. H. Cook and Jefferson Cook, but the mortgage was executed by W. H. Cook alone. They are made exhibits to the bill.

The first section of the said bill is in the following language: "That on the 8th day of January, 1885, Cook Bros., a firm composed of Wm. H. Cook and Rufus Cook, was indebted to your orators for goods sold them before that time, and that they and their father, Jefferson Cook, applied to your orators for a loan of an amount of money for the purpose of paying up said sum by Cook Bros., and also about six hundred dollars to aid Jefferson Cook in defense of a charge of pension fraud before the United States Court, as orators believe and so charge." This is the only reference in the bill to any debt due from Cook Bros. or the amount of it. To ascertain the amount would, at least, involve a calculation of interest accruing between the date and maturity of the note; for the sum of the debt due from Cook Bros. must have been the balance left of the nine hundred and thirty-four dollars after discounting, first, the sum advanced for Jefferson Cook's defense, and, second, the interest to accrue between the making and maturity of the note. Taking the averments of the bill to be true, as we must treat them on this inquiry, the sum must have been much less than three hundred dollars. As we have said, this is the only averment of a debt due from Cook Bros., and it is nowhere charged that the mortgage executed, or the collaterals placed, were intended to secure that indebtedness. From aught that appears in the bill, that former indebtedness, whatever its form or amount may have been, was a simple contract liability, accompanied by no equitable rights or liens for its enforcement. Particularly was that the case, so far as Rufus Cook is shown to have been concerned. And the bill nowhere in its averments or prayer seeks to enforce the collection of that original indebtedness of Cook Bros., nor are they made parties in their partnership name. The entire scope, purpose and prayer of the bill are to recover on the alleged negotiation and contract of W. H. Cook and Jeffer-

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son Cook, of date January 8, 1885; and in maintenance of their equity they set forth not only the written evidences of the contract, but their representations and other acts leading up to it.

Part of the decree of the chancellor rendered in that case is in the following language: "And it appearing from the report of the register that Cook Bros., a firm lately composed of Wm. H. Cook and Rufus Cook, is due and owing to complainants the sum of five hundred and seventy-three and 60-100 dollars: It is therefore ordered, adjudged and decreed that the complainants do have and recover of the said Cook Bros., a late firm composed of Wm. H. Cook and Rufus Cook, the said sum of five hundred and seventy-three and 60-100 dollars, for which let execution issue."

Under an execution issued on this decree it is manifest the sheriff would be commanded to levy, not only on the property of each of the defendants, Wm. H. and Rufus Cook, but on any property of the late firm of Cook Bros. If the chancellor could under any circumstances pronounce such decree for the enforcement of a simple, non-secured money liability, it is manifest there were no pleadings in the case before him to authorize the decree copied above.

Relief can not be granted for matters not charged, although the evidence may disclose a right to recover. "The reason of this," says Mr. Story, (Eq. Pl., § 257), "is that the defendant may be apprised by the bill what the suggestions and allegations are, against which he is to prepare his defense."—See also *Cameron v. Abbott*, 30 Ala. 416; *Flanagan v. State Bank*, 32 Ala. 508; *O'Bannon v. Myers*, 36 Ala. 551; *Rea v. Longstreet*, 54 Ala. 291; *Copeland v. Kehoe*, 57 Ala. 246; *Winter v. Merrick*, 69 Ala. 86; *Myer v. Mitchell*, 74 Ala. 475; *Webb v. Crawford* 77 Ala. 440; *Park v. Lide*, 90 Ala. 246; 7 So. Rep. 805; *Porter v. Collins*, 90 Ala. 510; 8 So. Rep. 80.

It is manifest from the statement of facts we have made—all of which are apparent on the face of the pleadings and in the final decree—that the chancellor erred in the decree sustaining the demurrer to the amended bill of review on any of the grounds set down.—Story's Eq. Pl., §§ 405, *et seq.*; *McDougald v. Dougherty*, 39 Ala. 409; *Bishop v. Wood*, 59 Ala. 253; *Tankersly v. Pettis*, 61 Ala. 354; *Goldsby v. Goldsby*, 67 Ala. 560; *McCall v. McCurdy*, 69 Ala. 65; *Smyth v. Fitzsimmons*, 97 Ala. 451; 12 So. Rep. 48; *Ashford v. Patton*, 70 Ala. 479; *Banks v. Long*, 79 Ala. 319.

Reversed and remanded.

Wallis Tobacco Co. v. Jackson.*Action of Assumpsit.*

1. *Agency; extent of authority.*—An agent who is conducting a certain business for his principal, and as such, is authorized to purchase supplies on credit, has authority to purchase only such supplies as are reasonably adapted to, or customarily used in a business of that kind; and it is the duty of the party selling to such agent to know that the goods sold are of such character as the nature of the business authorized the agent to purchase, and the burden is upon him to prove this fact.

APPEAL from Birmingham City Court.

Tried before the Hon. W. W. WILKERSON.

This was an action of assumpsit brought by the Wallis Tobacco Company against J. F. B. Jackson, and counted upon the common counts. The plaintiff introduced as a witness in its behalf one J. W. Wallis, who was president of the plaintiff, and who testified that between August 26, 1889, and October 26, 1889, W. E. Yancey purchased from the plaintiff a bill of goods for, and to be used in, the "Magic City Hotel" in the city of Birmingham; that when the goods were sold, he, the witness, sold them upon the faith that he was selling to one L. W. McCants, as the agent of the defendant; that said Yancey informed the witness that McCants was running the hotel for and as the agent of the defendant, and that he, Yancey, was purchasing the said goods for McCants as such agent; and that thereupon the plaintiff sold the goods upon credit, and the same were charged upon the books of said company to McCants, as agent for the defendant. Said W. E. Yancey was introduced as a witness and corroborated the witness Wallis as to the manner in which the goods were ordered from the company. L. W. McCants, who was introduced as a witness for the plaintiff, testified, among other things, that for the purpose of preventing garnishments being issued against his customers, which would necessitate the giving up of his hotel, the defendant agreed with the said McCants that the hotel should be run in the name of L. W. McCants, as agent for the defendant; and the agreement further provided as to how money due McCants from the railroad, for boarding certain hands, should be deposited with the American Na-

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tional Bank. Said McCants further testified that after said arrangement between himself and the defendant he deposited said money in the bank to the credit of McCants, agent of J. F. B. Jackson, and that he ran the said hotel in the name of L. W. McCants, Agent. The defendant, introduced as a witness in his own behalf, testified that he had no interest in said hotel business at the time of the trial, and had never had any, except he held a mortgage against said McCants; that he had not at any time authorized said McCants to run the hotel in his, defendant's, name; that he did not go about the hotel, and did not know that he was being held out to the world or to any one as the owner or manager of said hotel; and that he had no knowledge that the hotel was being run in the name of L. W. McCants as agent for him. The defendant further testified that the agreement between himself and McCants was made by him simply as a friend to help McCants out of his embarrassed condition; and that he knew nothing of the account sued on until a few days before suit, when it was presented, and he refused to pay it. The cause was tried without the intervention of a jury; and upon the introduction of all the evidence, the court rendered judgment for the defendant.

LANE & WHITE, for appellants. 1. McCants was the general agent of defendant. "A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment."—Story's Agency, §§ 17, 136, 137; Smith Merc. Law, p. 173; 1 Am. & Eng. Encyc. of Law, 348, § 6; *Witcher v. Brewer*, 49 Ala. 119. 2. "If the agent does no more than is natural and customary in managing and transacting such business, any private limitations and instructions will not affect the right of third persons to whom they are not communicated."—*Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Wheeler v. McGuire*, 86 Ala. 398; Parson Merc. Law, 135. 3. An agent acting under general authority binds his principal by any act done within the scope of his employment, even if done against instructions. Secret instructions can not affect third parties dealing with the agent.—1 Am. & Eng. Encyc. of Law, 350 and cases cited; *Winchell v. Nat'l. Ex. Co. (Vt.)*, 23 Atl. Rep. 728; *Barnett v. Glutting*, 29 N. E. Rep. 927; *Ala. Gr. So. R. R. Co. v. Hill*, 76 Ala. 303. 4. Though a general agent has no authority to buy goods on a credit, if the goods are delivered by seller without knowledge of such limitations, the seller is not bound by such limitations, and the principal is bound thereby. *Liddell v. Sahline (Ark.)*, 17 S. W. Rep. 705.

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HEWITT, WALKER & PORTER, *contra*, cited *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Herring, Farrell & Sherman v. Skaggs*, 73 Ala. 446; *Coleman v. Siler*, 74 Ala. 435; *Wheeler v. McGuire*, 86 Ala. 398.

HEAD, J.—The evidence in this case wholly fails to show that the goods, for the price of which this suit is brought, were reasonably necessary for the uses and purposes of the hotel which it is claimed McCants was conducting as agent for the defendant, or that they were such goods as were customarily used in the business of a hotel, or, indeed, that they were used at all in the business of the particular hotel. For aught the evidence discloses, they may have consisted of a stock of general merchandise, or agricultural implements, or some other commodities, having no use or place, either by custom or necessity, in the business of a hotel. If McCants was conducting the hotel as agent for the defendant, as contended, and as such was authorized to purchase supplies on credit, his agency extended no farther than the right to purchase such supplies as were reasonably adapted to, or customarily used in, a business of that kind; and it is the duty of the party selling, under such circumstances, to know that the goods sold are of such character as the nature of the business authorized the agent to purchase; and in a suit against the principal for the price the burden is on him, the seller, to prove the fact. See 1 Am. & Eng. Encyc. of Law, pp. 363-4, and notes.

This principle is invoked by the defendant's counsel, and, as we read this record, we can see no escape from its proper application to this case. It is unnecessary to consider the other questions. The judgment of the City Court is affirmed.

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Proceedings to Abate Assessment of Taxes.

1. *Taxation of personal property; determination of its situs.*—In determining the liability of personal property to taxation, its actual *situs*, and not the domicile of the owner, is the material inquiry; and if personal property is brought into this State for the purposes of carrying on certain work, and its business here is not merely transitory,
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but for an indefinite period, it becomes incorporated with the property in this State for revenue purposes, and is taxable here, notwithstanding the domicile of its owner is in another State.

2. *Same; floating property not exempt from taxation.*—The fact that property is floating, and may be moved from place to place by water, does not exempt it from taxation when it is otherwise taxable.

3. *Same; when tug-boat registered elsewhere taxable.*—A tug-boat, although sea-going propelled by steam, and registered at the port of its owner's domicile in another State, is taxable in this State, when its business is wholly in Alabama, and it is to remain here for an indefinite time.

APPEAL from the City Court of Mobile.

Heard before the Hon. O. J. SEMMES.

The appellant is a Delaware corporation. Under a contract entered into with the Government of the United States it continued the dredging of Mobile Bay, and in January, 1891, moved certain parts of its machinery—such as tug-boats, scows, &c.—to Mobile Bay. Some time after the 1st of May, 1891, the tax assessor of Mobile county put on the tax books of said county an assessment of the dredges, tug-boats and scows of the National Dredging Company, amounting to \$73,000.00. Thereupon the said Dredging Company presented its petition to the Board of Revenue of said county, praying that body to abate such assessment and expunge it from the tax books of 1891. In answer to said petition of the Dredging Company, the Board of Revenue held that certain items of property, amounting to \$40,000, had been improperly assessed against the Dredging Company, and ordered that the original assessment be reduced to \$33,000. From that judgment the company appealed to the City Court of Mobile, where a special finding of facts was made, and upon that special finding judgment was rendered confirming the judgment rendered by the Board of Revenue. This special finding by the court was the facts as contained in an agreed statement of facts. From such judgment of the City Court the present appeal is taken, and the same is here assigned as error. The opinion contains an epitome of the special finding.

GAYLORD B. & F. B. CLARK, and HANNIS TAYLOR, for appellant.—The *situs* of the property which is sought to be taxed is the controlling question. If personal property has not a determinate *situs*, different from that of the domicile of its owner, as a general proposition, it is taxable only at said domicile.—*Mayor, &c., of Mobile v. Baldwin*, 57 Ala. 61; *Trammell v. Connor*, 91 Ala. 398; *Boyd v. City of Selma*, 96 Ala. 144; 11 So. Rep. 397. If it appears, that at the time of

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the assessment of the property it was merely in the State temporarily, "in the course of its employment or trade," that it had no permanent *situs* in this State, then the tax imposed is illegal. It is shown by the facts in this case that there was no intention on the part of the appellant to allow this property to permanently remain in the State of Alabama, or to give it a *situs* here. The intention was only to use the property for a time during which a definite end was to be accomplished, to-wit, the performance of a contract, which might be prolonged more or less by the exigencies of the weather or the like. Under such circumstances no *situs* would be established here. *Peop's v. Commissioners of Taxation*, 59 N. Y. 40; *Pac. Mail Co. v. Board of Supervisors*, 50 Cal. 283; *Parker Mills v. Commissioners of Taxation*, 23 N. Y. 242-245.

WM. S. ANDERSON, *contra*.—All property brought into this State after the first day of January, and before the tax assessor has completed his assessment is subject to taxation under section 458 of the Code. The legal fiction that personal property follows the person of the owner has no application to questions of revenue.—*Redmond v. Commissioners*, 87 N. C. 122; *Burroughs on Taxation*, 47; *St. Louis County Court v. Taylor's Admr.*, 47 Mo. 594; *Alvany v. Powell*, 2 Jones' Eq. 51.

The liability of personal property to taxation is terminate by its actual *situs*, and not by the domicile of the owner.—*Mayor, &c., of Mobile v. Baldwin*, 57 Ala. 61; *Trammell v. Connor*, 91 Ala. 398. When personal property is employed within the State for an indefinite period, and not here temporarily, it is subject to taxation.—*Battle v. Corporation of Mobile*, 9 Ala. 238; *St. Louis v. Ferry Co.*, 11 Wall. 431; *Transportation Co. v. Wheeling*, 99 U. S. 279; *City of Albany v. Meeken*, 3 Ind. 481; *Wilkey v. City of Pekin*, 19 Ill. 160.

MCCLELLAN, J.—The question presented on this record is whether certain property of the National Dredging Company had a *situs* in this State for the purposes of taxation when the assessment complained of was made in the Spring of 1891. The property was brought into the State after January 1st of that year and before the assessor had completed his assessment, and hence was properly assessed if taxable at all in this State under the agreed facts.—Code, § 458. Those facts are: The National Dredging Company is a Delaware corporation, domiciled at Wilmington in that

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State. As its name indicates, its business or a part of its business, is the operation "of machines, steam tugs, lighters, machinery and appliances for the improvement of rivers, harbors, channels, docks, water courses, low lands," &c. In the Fall or early Winter of 1890 it entered into a contract with the United States for continuing the work of dredging the channel of Mobile Bay, entered upon the execution thereof early in 1891, and from that time on down to the time of the trial of this cause in the City Court, July 30, 1892, has been and was at said last mentioned date still engaged therein. The property found subject to taxation, to-wit, one dredge boat, "Forbes," one tug boat, "Curtis," and five mud scows, was brought into this State when the performance of the contract was entered upon, that is, in January or February, 1891, and had remained here up to the trial, except some portion thereof, not specified, which was removed to the State of Maine in March or February, 1892. The contract with the Government had not been completed on July 30, 1892, but its completion would "occur shortly" thereafter, and after such completion the company would have no further use for this property in Alabama. The said tug boat, dredge and scows were floating property, capable of being moved from port to port—the tug of its own motive power, and the dredge and scows by being towed; and the tug "Curtis" is registered in the custom house at Wilmington, Delaware. It is clear from the foregoing epitome of the facts that all of this property was at the time of the assessment being used in the State of Alabama in the prosecution of works wholly within the State, under a contract which involved its presence here in that work for a time, the duration of which was indefinite, but which extended beyond a year and a half, and the end of which, even from the standpoint of the latter date, could not be more definitely fixed than as "shortly to occur." During all this time and possibly to the present moment the property has been wholly within Alabama; engaged in a business or being used in a work which did not involve its passing even temporarily beyond the limits of the State. Moreover, it has all along been used and possibly is even now being used in the prosecution of this work precisely as property belonging to citizens of this State would be used therein. Indeed, as appears from this record, other property of the same kind, which had previously been used by residents of Alabama in the prosecution of this work, was purchased by the appellant company, and, being incorporated with that involved here, has all along been used like it in

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dredging the channel of Mobile Bay, and one scow so used was built in the city of Mobile, and has never been, we assume, outside of the State. Again, not only is the period of the contract in the execution of which this property is kept in the State indefinite, and hence the duration of its presence here in the execution of that contract uncertain, but it is manifest from the agreed facts that this contract is only one of a series for the dredging of the channel in Mobile Bay, covering years before and after the year 1891. This work was in the line of the dredging corporation's business, it had secured this contract under one annual congressional appropriation when it had to bring its machinery and appliances—this property—to Mobile for its execution. Having it there, and being thus in a more advantageous position for entering into another contract or other successive contracts as appropriations are made by Congress, it is fair to assume that the National Dredging Company will enter into other contracts, or rather, at least, that its purpose and intention is to do so if favorable terms can be made. These considerations are proper in arriving at the *situs* of this property. They go to show, by reference to the owner's intention as fairly inferable from all the circumstances, an indefiniteness as to the period of the presence of these boats and scows wholly within Alabama beyond that existing as to the duration of the first contract, and the use of the property here in performance thereof. In other words, taking into consideration the business of the corporation, the amount and continuing character of the work to be done in Mobile Bay, the preparations made by the company for doing so much thereof as is authorized under one annual appropriation, it may be that this property will be for years engaged upon this work, as a part of that now being used by the company of like kind with this had been used thereon for a year or years prior to 1891. On this state of the case—or even leaving out of view the considerations last adverted to—it is clear, we think, that this property is not merely temporarily within Alabama, but that, to the contrary, its presence here is for such an indefinite period as involves the idea of permanency, in the sense in which that term is used with respect to the *situs* of property for the purposes of taxation. It is here as any other property is or would be here in use upon the public works in Mobile Bay. Its use in that work is the same as that of the other property originally embraced in this assessment and formerly owned by a citizen of Alabama and by him devoted to this work during previous years, the same as that of the scow

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which was built in Mobile for this work and has never been beyond the State, and the same as that of another scow built outside of the State for this work. All this other property is property of the State or in the State for the purposes of taxation, though it may at some uncertain future time cease to be property taxable here in consequence of its removal to other jurisdictions, as the property in controversy may sometime be carried out of the State. Until that happens, however, both classes of property enjoy the same protection of our laws, both classes are devoted to the same use, the continuation of each class within the State is alike indefinite; the one class can not, in short, be distinguished from the other in any characteristic which is of importance in determining the question of taxability *vel non*. And hence our conclusion that the property in controversy had become so incorporated with, and a part of, the tangible property of this State, for revenue purposes, as that its taxable *situs* is here, notwithstanding the fact that the domicil of its owner is in another State.—*Mayor of Mobile v. Baldwin*, 57 Ala. 61; *Boyd v. City of Selma*, 96 Ala. 144; 11 So. Rep. 393; *Burroughs on Taxation*, pp. 40-1; *Trammell v. Connor*, 91 Ala. 398.

There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property and may be moved from place to place and port to port by water furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float and could be moved from place to place only overland.

With respect to the tug boat *Curtis*, a special consideration is advanced in support of its non-taxability. It is a sea-going vessel, propelled by steam, and is entitled to registry under statutes of the United States at the port of its owner's domicil. As matter of fact, it is registered at the custom house in the City of Wilmington, Delaware. On this the contention is that that being home, it can not be taxed elsewhere. There are many cases which hold that such vessel, engaged in commerce between its home port and others, or even wholly between other ports than that of its registry, can be taxed only at the port of registry. It is not our purpose to question these decisions; it is not necessary that we should. They all proceed upon the theory that vessels thus engaged are never in foreign jurisdiction except *temporarily*, and as an incident to the commerce to which they are devoted, and hence that they do not and can not acquire a *situs* in foreign ports for the purposes of taxation: they do not become incorporated with the property of

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other States and countries which they touch intermittently, are never indefinitely there, and their business, the work they perform, the uses to which they are put, is not done and performed within, and are not local to, the foreign State or country. These considerations can have no application here. The tug Curtis is not engaged in commerce, foreign or inter-state. Its business is wholly within Alabama. It is not here temporarily, but indefinitely. It is as much a part of the property of the State for taxation as if it had been chartered for an indefinite period of time to carry freight and passengers, or towships over the waters of Mobile Bay between the city and Point Clear, or as if its owner had devoted it to the carrying trade of the Alabama River; and surely in these cases it could not be successfully insisted that it was not as much Alabama property for taxation as any other boat devoted exclusively to the navigation of the water courses of the State. The question, indeed, is at last one of *situs* in fact, and where this is shown neither foreign registry nor foreign ownership is of any consequence. The judgment of the City Court is affirmed.

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Motion to set aside Judgment in Condemnation Proceeding.

1. *When judgment not set aside for want of notice.*—A judgment in a condemnation proceeding in the Circuit Court, on appeal from the Probate Court, will not be set aside for an alleged want of notice to the respondent of the appeal from the Probate Court, when the record shows the respondent appeared in the Circuit Court by her attorney, and defended against the judgment of condemnation.

2. *Appearance shown by the record conclusive.*—When it is shown by the record that on an appeal to the Circuit Court the defendant appeared by her attorney and defended, such appearance can not be disputed on motion to set aside the judgment for want of notice of appeal: the record entry in such case being conclusive.

3. *Amendment of petition.*—On appeal to the Circuit Court from a judgment in the Probate Court in a condemnation proceeding, the petition can be amended so as to include more land than was included in the original petition; and both parties being before the court when such amendment was allowed, the judgment in such cause by the appellate court will not be set aside on account of such amendment.

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APPEAL from Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

The Alabama Midland Railway Co. instituted proceedings in the Probate Court of Montgomery County to condemn a certain strip of land, which was the property of Nancy E. H. Newton. From a judgment of the Probate Court dismissing the petition, the Railway Co. appealed to the Circuit Court, where judgment was rendered in favor of the petitioner. The facts are sufficiently stated in the opinion. The present appeal is prosecuted from a judgment of the Circuit Court, refusing a motion made by Mrs. Newton to set aside the judgment rendered in favor of the petitioner.

RICHARDSON & REESE, for appellant.—The petition should not have been amended in the Circuit Court.—*Pettus v. McClannahan*, 2 Ala. 55; *Buchanan v. Thomason*, 70 Ala. 401, 402; 3 Brick. Dig. 140, §§ 137, 140; *Freeman on Judgment*, § 98; *Ex parte Sandford*, 5 Ala. 562; *Black on Judgment*, § 278. The court erred in refusing to grant the motion of the appellant to vacate the judgment of the Circuit Court.—*Bachman v. Sepulveda*, 39 Cal. 688; *Putnam v. Lamphier*, 36 Cal. 158; *Frevert v. Henry*, 14 Nevada 191; *Parsley v. Nicholson*, 65 N. C. 207; *Marshman v. Conklin*, 21 N. J. Eq. 546.

A. A. WILEY, *contra*.—The record of the lower court was conclusive as to all the facts shown therein.—*Tankersley v. Pettis*, 71 Ala. 179; *Roberts v. Rice*, 71 Ala. 189; *Strange v. Moog*, 72 Ala. 460; Cases cited in 3 Brick. Dig. p. 580, § 75; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; *Well's Res Adjudicata*, § 217. The motion to set aside the judgment was properly refused. *Renfro Bros. v. Merryman & Co.*, 71 Ala. 195; *Ex parte O'Neal*, 72 Ala. 560; *Brock v. S. & N. R. R. Co.*, 65 Ala. 79; *Blood v. Beadle*, 65 Ala. 103.

HEAD, J.—The Alabama Midland Railway Company instituted proceedings in the Probate Court of Montgomery county to condemn a right of way over the lands of the appellant, under Art. 2, Chap. 15, Title 2, Part 3 of the Code. Such proceedings were had, in that court, that on the 27th day of April, 1891, the petition was dismissed. On Nov. 11th, 1891, the petitioner obtained an appeal to the Circuit Court of the county from the order of dismissal, and the cause was regularly certified to, and docketed in that court. The same counsel who had been employed by Mrs. Newton to represent her, and who did represent her in the Probate Court, appeared to represent, and did represent,

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her cause, on appeal, in the Circuit Court. In that court, counsel of Mrs. Newton being present, the petition was amended so as to enlarge the right of way sought to be condemned from eighty feet to one hundred feet in width; and the cause then coming on for trial, on the 11th day of February, 1892, as the judgment entry recites, all the parties appeared by their attorneys, and a trial was had by jury who rendered a verdict in favor of the petitioner, and assessed the damages to be paid to Mrs. Newton at \$700; and thereupon the court rendered judgment of condemnation in due form. At the next term of court thereafter, the appellant moved the Circuit Court to set aside the judgment on the ground that it was void, for the reasons: 1st. That no notice of the appeal was served upon her, or upon any one authorized to act for her, and that she never authorized or empowered any one to accept service or waive notice in that behalf for her. 2d. The petition as filed and tried in said Probate Court, and upon which judgment was rendered in her favor, asked for the condemnation of eighty feet of land in width running through her entire premises, and that after the cause was removed by appeal from the Probate Court the petition was amended by asking for the condemnation of a strip of land running through her premises one hundred feet wide, and thus changed to that extent the subject matter of the suit.

1. It is immaterial whether notice of the appeal was served on Mrs. Newton, or her counsel, or not, since the record shows she duly appeared in the cause, in the appellate court, by her attorneys. The purpose of notice to a party is to bring him into court. If he voluntarily appears notice is unnecessary. The fact of such appearance, when it is shown by the record, can not be disputed on motion to set aside the judgment. The record is conclusive in such a case.—*Pettus v. McClannahan*, 52 Ala. 55; 2 Brick. Dig. 140, §§ 137-140.

2. Under our liberal system of amendments the Circuit Court had authority to permit the amendment of the petition. It embraced the same land as that sought to be condemned by the original petition, and twenty feet, in width, in addition. The parties were before the court when the amendment was allowed and the cause was tried on it.—*Ex parte North*, 49 Ala. 385; *Dothard v. Teague*, 40 Ala. 583; 1 Brick. Dig., p. 75, §§ 77 et seq.

The judgment is not, for any reason, void on its face, and the court has no power to set it aside at a subsequent term.

Affirmed.

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[Richmond & Danville R. R. Co. v. Thomason.]

Richmond & Danville Railroad Co. v. Thomason,

Action for Damages by Brakeman for Personal Injuries.

1. *Contributory negligence in uncoupling cars; violation of known rule.*—A brakeman on a railroad, who, in violation of a known rule of the company, and without excuse, attempts to uncouple cars while in motion, and injury results therefrom, is guilty of contributory negligence; and when the evidence shows that had he observed the rules of the company the negligence charged against his co-employees would not have caused the injury complained of, the general affirmative charge should be given for the defendant.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

This was an action brought by the appellee, Jeff. Thomason, against the Richmond & Danville Railroad Company, and sought to recover damages for personal injuries alleged to have been inflicted upon the plaintiff by reason of the negligence of his co-employees. The facts of the case are sufficiently stated in the opinion. Among other charges requested by the defendant, and to the refusal to give which the defendant separately excepted, was the following: "The court charges the jury that if they believe the evidence they must find for the defendant." There was judgment for the plaintiff, and the defendant appeals.

KNOX & BOWIE and JOHN PELHAM, for appellant. The general affirmative charge asked by the defendant should have been given.—*Pryor v. L. & N. R. R. Co.*, 90 Ala. 32.

BLACKWELL & KEITH, *contra*.—There was certainly enough in plaintiff's case, as shown by the evidence, to submit it to the jury.—*R. & D. R. R. Co. v. Ruld*, 14 S. E. Rep. 361.

COLEMAN, J.—The plaintiff, Jeff. Thomason, an employee as brakeman of the defendant, while endeavoring to uncouple certain cars in the course of his employment, fell between the cars and was run over and injured. It is charged in the first count that the engineer "negligently and carelessly and wrongfully stopped the train of cars with a sudden jerk, by which plaintiff, without fault, was thrown

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off the cars;" and that he "negligently, carelessly and wrongfully started the train again after plaintiff fell, and before plaintiff could extricate himself from his dangerous position." In the second count, the negligence charged is that of the yard-master, in causing said train "to be suddenly stopped with a jerk, by which the plaintiff was hurled or pitched off the car on which he was standing," &c. The court was requested in writing to give the general affirmative charge in favor of the defendant. This charge was refused. If the court erred in refusing this charge, it is unnecessary to consider any other assignment of error.

The case was tried upon the evidence introduced by plaintiff, and that brought out by defendant on cross-examination. It is not contended that either the engineer or yard-master was guilty of more than simple negligence. We need not, and do not, decide whether either the engineer or yard-master was guilty of the negligence as charged in the complaint. Conceding this point for the argument, does the uncontroverted evidence show that plaintiff was guilty of such contributory negligence as to destroy his right to recover? The plaintiff for himself testified, that the "train was going between twelve and fifteen miles an hour;" and the witness, Swope, "at fifteen miles an hour," while the yard-master, Leach, testifies that the train was moving at five or six miles per hour. Leach did not see plaintiff's position at the time he fell. Both plaintiff and the witness Swope testify, that while the train was moving, the plaintiff was standing on a foot-board between the cars; that he was holding on to one car with one hand, and "leaning over," or, as testified to by one witness, "reaching over," with the other hand to uncouple the car, when the train came to a sudden stop, precipitating the plaintiff down between the cars, where he was injured. While plaintiff was on the stand as a witness in his own behalf, Rule J. of the company was read to him in the presence of the jury, and he was asked by defendant's attorney, if he knew such to be the rule of the company governing employees? This rule, among other things, provides that "any employee going between cars . . . for the purpose of coupling or uncoupling cars, while the train is in motion, does so at his own risk, and against the rules of the company, and will be immediately discharged from its service," &c. Plaintiff's own testimony showed that when injured he had been in the employment of the company only seven or eight days, and that during his last term of employment he had not been instructed in the rules of the company, but had been fully

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instructed during a former service of employment by the defendant, and "that he knew it was against the rules of the company to go between the cars to uncouple them while they were moving." He testified that he had never seen Rule J., and so far as he knew no one had read this particular rule to him; that "he had never heard any rule against uncoupling cars in the manner in which he was doing it at the time he was hurt," but that "he did know the rules of the company prohibited coupling or uncoupling cars while in motion, and without using a stick;" that "he did not have a stick; cars can not be uncoupled with a stick;" that he "could have effected the uncoupling of the car with safety in the manner undertaken by him, if the car had not been suddenly stopped." The plaintiff further testified, that the train had stopped a few minutes before, at which time he had the opportunity to uncouple the cars with safety, and that if he had waited until the cars stopped again, he could have uncoupled them with safety. There is no evidence to show that he was under any duty or that there was any apparent necessity, to attempt to uncouple the cars at the time and place when and where he was injured, or for exposing himself in so perilous a position, when the train was suddenly stopped. We have omitted from this statement of facts all the evidence further tending to show contributory negligence on his part, as, under our practice in jury trials, the general charge should never be given, if there is any evidence tending to support a conclusion contrary to that asserted by a general affirmative charge. Considered from a standpoint most favorable to plaintiff, we must hold him guilty of contributory negligence. Although he testified that he had never seen Rule J., and did not remember that that particular rule was ever read to him, he did testify repeatedly that, when formerly in the service of the defendant, he had been instructed in the rules of the company, and that independent of Rule J., he knew that it was against the rules of the company "to uncouple cars while in motion," and there is no excuse given for disobeying the rules in this instance. It is clear that plaintiff was knowingly violating a rule of the company at the time he was injured, and without excuse, and that had he observed the rules of the defendant the negligence charged against the engineer or yard-master, if proven (and upon this we express no opinion), would not have caused the injury.

We will not comment on other evidence in the case, as it might unduly prejudice the plaintiff on another trial. Upon the facts, as stated in the record, the plaintiff was

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guilty of contributory negligence, and the defendant was entitled to the general charge.

Reversed and remanded.

Alabama State Land Co. v. Kyle et al.

Action of Ejectment.

1. *Statute of limitations.*—A reservation by the State of an ulterior equitable interest in the proceeds of lands sold by the State does not prevent the statute of limitations from running against the State's grantees from the date of the conveyance, in favor of persons in possession of such lands at the time of the grant.

2. *Evidence; admissibility of copy of certificate.*—The original of a certificate of entry, being shown to be without the jurisdiction of the court, a copy thereof, duly established by evidence as such, is admissible in evidence.

3. *Same; when certificate of entry admissible to show color of title without proof of execution.*—On the trial of an issue as to adverse possession by defendant, a certificate of entry to his grantor, in connection with other evidence that he actually held possession and claimed title under it, is admissible in evidence, without proof of its execution, as color of title to fix the boundaries of defendant's possessions.

4. *Same; admissibility of agreement by tenant to remain in possession.* In ejectment where the issue is adverse possession, the defendant can prove an agreement with the tenant of his predecessor in title, by which the said tenant remained in possession as the defendant's tenant,

5. *Possession by tenant; presumed to be continuous.*—When after a contract of tenancy the landlord sees the tenant in possession, cultivating the land, and after an absence of nine years returns and finds the tenant still in possession, it will be presumed that the possession of the tenant under said landlord was continuous during all of that time.

6. *Certificate of entry; extent of possession thereunder.*—Where one goes into possession of land under a certificate of entry, builds his house on one forty acres, lives in it and clears and cultivates lands lapping over into a part of his entry in another section, and during his occupancy clears portions of each forty acres embraced in the entry and gets wood and timber generally from all parts of the land, his possession extends to the whole tract, and is adverse; and this possession is not interrupted or broken by the sale of forty acres, which does not sever from the rest of the tract the forty acres on which his house is built, but leaves the latter forty still cornering with a forty unsold.

7. *Adverse possession; must be continuous.*—Evidence that one claiming title to land leased it for one or two years to another who cut and hauled a quantity of wood from it, and that thereafter there was no other occupancy for five years, when it was again leased to another tenant, who occupied it for five years, does not show that continuous possession for ten years necessary to give title under the statute of limitations.

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APPEAL from the City Court of Gadsden.

Tried before Hon. JOHN H. DISQUE.

This was a common law action of ejectment, and was commenced May 20, 1890. Three demises are alleged in the declaration. In the first count recovery is sought on the demise of the State of Alabama; in the second, on the demise of Swann & Billups, trustees; and in the third on the demise of the Alabama State Land Company. The parties defendant to said action were R. B. Kyle, John S. Paden, Charles E. Heath, Samuel Clayton, Mrs. Jane Clayton and Sam Henry. There was judgment for the defendants and the Alabama State Land Company now prosecutes this appeal.

The land sued for was the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$; and N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$; the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$; and the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 31, Township 11, Range 6 East; and was embraced in a grant of lands to the State of Alabama by an act of Congress approved June 3, 1856, to aid in the construction of certain railroads therein mentioned, and it was included in the land afterwards set apart and allowed by the State for the two railroads, which were consolidated into the Alabama & Chattanooga Railroad Company.

On February 8, 1877, the Governor of the State of Alabama executed a deed to Swann and Billups, as trustees, conveying to them, among others, the lands here sued for. On December 8, 1886, Swann & Billups, as trustees, executed a deed to the Alabama State Land Company, conveying among others, the lands sued for in this action. This deed constitutes the basis of the claim of the plaintiff, the Alabama State Land Company, to the land in controversy, and was introduced in evidence on the trial.

James Aiken, who was introduced as a witness on behalf of the defendants, testified that one Joseph Clayton came to his law office and brought with him a certificate of entry to the lands sued for in this action, and that the witness sent the original to Washington to the General Land Office, and that he had never seen the original since. The defendants' counsel then offered to introduce in evidence a paper which the witness Aiken testified was a correct copy of the certificate of entry. Plaintiff objected on the ground that the execution of the original had not been shown, and, second, that it had not been shown that Clayton was in possession claiming and holding under the original copy. The court overruled this objection, allowed the copy to be introduced in evidence as color of title only, and to this ruling of the

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court, plaintiff duly excepted. The paper so introduced was a copy of the certificate of entry, dated April 10, 1860, duly signed by the Receiver, showing that the said Joseph Clayton had entered the land sued for in this action.

There was testimony introduced for the defendants tending to show that the said Joseph Clayton went into the possession of the land included in the said certificate, and claimed the same as his own, and exercised acts of ownership over it, until he sold or attempted to sell, the same by various deeds executed by him.

The defendants introduced in evidence the following deeds: From Joseph Clayton and wife to W. P. Golightly to the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 31, Township 11, Range 6 East, dated in 1877. Deed from Joseph Clayton and wife to Sam Henry, dated April 10, 1877 to the East $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and 20 acres more or less of N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ (describing the same by metes and bounds) all in section 31 township 11, Range 6 East. Deed from W. P. Golightly and wife to R. B. Kyle, dated October, 1878, to the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Section 31, Township 11, Range 6 East. Deed from R. B. Kyle and wife to J. S. Paden, dated February 9th, 1887, to the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Section 31, Township 11, Range 6, East. Deed from Jane Clayton, widow of Joseph Clayton, to Joseph S. Clayton her son, dated April 16, 1888 to N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Section 31, Township 11, Range 6 East.

The defendants' evidence further tended to show "that in 1878 and 1879 Sam Henry resided about four miles from the land, and during that time he leased the land to a man who cut and hauled a large quantity of wood from the land; that nothing further was done by him except to pay the taxes on the land and claim it as his own, which he did until the year 1883, when he leased it to another tenant who cultivated it for about five years.

The land described in the deeds from Clayton to Golightly, and Golightly to Kyle, and from Kyle to Paden was cultivated one year by a man named Higgins as a tenant of Golightly, who turned over the possession to Kyle. Kyle testified that he never lived on the lands, but that one Higgins was on the land as the tenant of Golightly; and that immediately after his, Kyle's, purchase, he saw Higgins and told him that he could continue to live on the land, and that Higgins thereupon agreed with Kyle to hold said land as Kyle's tenant, and agreed to keep up fencing, &c. in payment of rents. This agreement was made in Gadsden, Ala. while Higgins was in possession of the land. The

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plaintiff moved the court to exclude the conversation testified to between Kyle and Higgins, on the grounds that it was irrelevant and inadmissible, and "that the declaration was not made while the parties were on the land." This motion was overruled by the court, and plaintiff excepted. The witness Kyle further testified that he went over the land shortly after this, and saw Higgins there cultivating a portion of the land and improving the fences, &c., and was not on the land any more until about the time he sold to Paden, when he returned and found Higgins still living on the land. Paden testified that when he purchased from Kyle, in 1887, he found Higgins in possession, and that he, Paden, had continued to keep a tenant, cultivating a portion of the land ever since. It was further shown by the testimony for the defendant that after their several purchases, Henry, Kyle and Paden claimed the land described in their deeds, and paid taxes on it up to the time the present suit was brought.

In rebuttal to the testimony of the defendants, plaintiffs introduced the certified transcript from the commissioner of the General Land Office, showing that the lands sued for, and which were claimed by the defendants under title derived from Joseph Clayton, by virtue of his entry of the same, were at the time of said entry embraced in the grant of lands to the State of Alabama, by an act of Congress approved June 3, 1856, and that the right of the Alabama & Chattanooga Railroad Company had attached to the same, and that Clayton's entry thereof was illegal and had been cancelled.

The cause was tried without the intervention of a jury; and upon hearing all the evidence the court rendered judgment for the defendants.

SMITH & LOWE, for appellant.

AMOS E. GOODHUE, *contra*.

HEAD, J.—The Alabama State Land Co. claims title to the land sued for by conveyance from Swann and Billups. The history of the title of Swann and Billups may be found in the reported cases of *Swann & Billups v. Gaston*, 87 Ala. 569; *Same v. Lindsey*, 70 Ala. 507; *Ware v. Swann & Billups*, 79 Ala. 330; *Standifer v. Swann & Billups*, 78 Ala. 88; and it is unnecessary to repeat it here. The plaintiff's *prima facie* title is made out, and the defendants set up no superior title in themselves other than that which they

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claim to have acquired by adverse possession of the premises for ten and twenty years. Until the State of Alabama divested itself of title to these lands by the authorized conveyance of the Governor executed to Swann & Billups, on the 8th day of February, 1877, it is clear the statute of limitations did not begin to run in favor of defendants.—*Swann & Billups v. Gaston*, 87 Ala. 569. But it is contended by the plaintiff that the statute did not then begin to run, because, by the conveyance to Swann & Billups, a trust was created for the use of the State, in this, that Swann & Billups, the trustees, were required by the instrument to pay into the State treasury, after paying the costs and expenses of making the sales, ten *per cent.* of the proceeds of all sales of lands which should be made by them, under and by virtue of the conveyance, in order to reimburse the State certain interest it had theretofore paid by reason of its indorsement of the bonds of the Alabama and Chattanooga Railroad Company, which trust continued, not completely executed, until a period within less than ten years before the institution of the present suit. It appears that such a trust was so created and continued. The conveyance, in all other respects, was for the use of individuals. We have been referred to no authority in support of this contention of the plaintiff, and have been able to find none. This is an action of ejectment by the vendee of Swann & Billups, to enforce the legal title. No recovery can be had on the demise of the State, laid in the declaration, for confessedly the State parted with the legal title by the conveyance to Swann & Billups. From the moment of that conveyance, the grantees therein became seized as individuals, and invested with full and ample power to sue and enforce the title so acquired. This is not an action by the State, asserting a title in itself against the adverse holding of the defendants. It could maintain no action, because it has no title. Swann & Billups having acquired the title, if thereafter they and their vendees acquiesced in the adverse possession of others for the period prescribed by the statute of limitations, they are, by such acquiescence, as effectually barred as if they had conveyed to such adverse holders. The fact that the State, in parting with its title, reserved an ulterior equitable interest in the proceeds of the lands can exert no influence whatever upon the question of legal title, with which we are now concerned. It will be time to consider its immunities from the operation of the statute, when it comes to enforce its equitable rights.—*Bank of the United States v. McKenzie*, 2 Brock.

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C. C. 393, op. by Marshall C. J.; *Bank of Ky. v. Wister et al.* 2 Peters, 318.

There was no error in admitting secondary evidence of the certificate of entry which purported to have been issued to Joseph Clayton. It was shown, in connection with evidence of Clayton's possession and claim of ownership of the land under it, subsequently introduced, that the paper had been in the possession of Clayton, and that his attorney sent it to the Land Office in Washington. The original being shown to be without the jurisdiction of the court, a copy, duly established by evidence as such, was admissible. It was not necessary to prove the execution of the certificate. It was offered merely as color of title, to fix the boundaries of Clayton's possession, and was admissible for that purpose, without proof of execution, in connection with other evidence that he actually held possession and claimed title under it.

There was clearly no error in permitting proof by Kyle of his agreement with Higgins, by which he constituted Higgins his tenant of that portion of the lands in controversy claimed by him.

As to the forty acres in suit, sold by Clayton to Golightly, and by Golightly to Kyle, and Kyle to Paden, the evidence shows a continuous, actual adverse possession by the several parties for more than ten years after the State parted with its title, and before this suit was brought. Under the facts shown in evidence, it will be presumed that Higgins' possession, as tenant of Kyle, which was shown to have commenced, continued until Kyle returned to the place and found him there, at the time of the sale to Paden.—*Clements v. Hays*, 76 Ala. 280; *Daniels v. Hamilton*, 52 Ala. 105.

The entire lands claimed by Joseph Clayton, under the certificate of entry, lay in a body, as one tract. He, in fact, had and acquired no title to any part of them, but went into possession under claim of title to the whole, under the certificate. He built his house on the forty acres in section 36, and lived in it, and cleared and cultivated land around it, lapping over into a part of his entry in section 31. During his occupancy, he cleared portions of each forty embraced in the whole tract, and got wood and timber generally from all parts of the land. This possession continued until he sold to Golightly and Henry, and thereafter, except as to the lands sold Golightly and Henry, until his death; and a similar possession and claim of title continued in his widow and children from his death to the time of trial. The sale of the forty acres to Golightly did not sever the forty on

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which Clayton's house stood from the rest of the tract. The latter still cornered with a forty unsold. We think, under the evidence, it must be held that the possession of Clayton, and his widow and children after him, must be referred to the boundaries of the land contained in the certificate of entry, which possession ripened into title before this suit was brought.

As to the forty acres sold to Sam Henry the case is different. As we have seen the statute began to run with the execution of the deed by the State to Swann and Billups on the 8th day of February, 1877. The only evidence of possession of Henry's land after that date is, that, in 1878 and 1879, Henry leased the land to a man who cut and hauled a large quantity of wood from it; and it is shown that after that time there was no other occupancy until 1883, when Henry leased it to another tenant, who occupied it five years. This clearly falls short of that continuous possession for ten years essential to give title under the statute of limitations; and the judgment of the City Court will be reversed, and a judgment here rendered for the plaintiff for the twenty acres sued for, which was sold to said Henry by Clayton.

We have considered the questions raised by defendant's counsel, viz.: 1. That the certification by the Department of the Interior, of the lands embraced in the grant, is too indefinite to show that these lands were a part thereof; 2. That it is not shown that there was a definite location of the Alabama and Chattanooga Railroad, by which their lands could be identified; and 3. That the assignment of errors in this case is by the Alabama State Land Company, and, therefore, there can be no recovery on the demise of Swann and Billups; and that as defendants were in the adverse possession of the land when Swann and Billups conveyed to the Alabama State Land Company, that conveyance is void for maintenance, hence no recovery can be had on the demise of that company; and think they are without merit. The evidence in the record overcomes the first and second objections. It is true there can be no recovery on the demise of the Alabama State Land Company, because of the doctrine of maintenance, as asserted; but, on due consideration, we construe the appeal and assignment of errors to be by the plaintiff in the cause, in the name of a fiction, justifying a recovery here, as in the court below, on the demise of Swann and Billups. The judgment in this case will take effect as of the date of the submission of this cause.

Reversed and rendered.

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[Smith v. Town of Warrior.]

Smith v. Town of Warrior.

Prosecution for Illegal Sale of Liquor.

1. *Sufficiency of complaint.*—On an appeal to the Circuit Court, a complaint averring that the defendant "did sell spiritous, vinous or malt liquors in quantities less than one quart, within the corporate limits of the town of W., and that the same is a violation of and contrary to an ordinance of said town," setting out said ordinance, is sufficient and not demurrable.

2. *Municipal corporation; sufficient allegation of its existence.*—A complaint by a town, alleging that the defendant sold liquors within the corporate limits of said town, sufficiently avers that the plaintiff is a municipal corporation.

3. *Municipal corporation, incorporated under the general statute; right to prohibit the sale of liquors at retail.*—A municipal corporation, incorporated under the general statute, has the power to prohibit the sale of liquor within its corporate limits by ordinance properly enacted.

APPEAL from Circuit Court of Jefferson.

Tried before the HON. JAMES B. HEAD.

The facts of this case are sufficiently stated in the opinion.

R. L. THORNTON, for appellant.

JOHN T. SHUGART, *contra*.

STONE, C. J.—Smith, the appellant, was arrested, tried and fined for an alleged violation of an ordinance of the town of Warrior, making it a penal offense to sell spiritous, vinous or malt liquors within the corporate limits of said town, in less quantities than one quart. From the judgment of conviction he appealed to the Circuit Court. In the Circuit Court a complaint was filed, setting out a copy of the ordinance, and averring that the defendant, Thomas L. Smith, "did sell spiritous, vinous or malt liquors in quantities less than one quart, within the corporate limits of the town of Warrior, and that the same is in violation of, and contrary to an ordinance of said town of Warrior, in words and figures as follows, to-wit: 'Be it ordained by the board of corporate authorities of the town of Warrior, that any person who sells, barter, exchanges, gives away, or otherwise disposes of any spiritous, vinous or malt liquors, or intoxicating bitters or beverages, within the corporate limits of the town of Warrior, shall upon conviction be fined,'" &c.

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To this complaint defendant Smith demurred, assigning causes, as follows:

1. "Said ordinance is void for uncertainty." 2. "Said complaint charges several and distinct violations of said alleged ordinance in one count." 3. "It is not shown in said complaint whether defendant disposed of spiritous, vinous or malt liquors, or intoxicating liquors or beverages, or all of such liquors." 4. "It is not shown by said complaint that plaintiff is a municipal corporation." 5. "It is not shown by the allegations of said complaint that plaintiff had any power or authority to enact such ordinance." 6. "A municipal corporation organized under the general laws of Alabama has no power or authority to enact such ordinance." The demurrer was overruled, and this ruling on demurrer presents the sole question for our consideration.

Under the statute law of this State, section 4385 of the Code of 1886, offenses of the same character, and subject to the same punishment, may be charged in the same count in the alternative. The averment of the sale, found in the complaint before us, would be sufficient in an indictment for retailing spiritous liquors without license, and we can not consistently hold that greater strictness should be required in a proceeding under the ordinance of the town of Warrior. *Burdine v. State*, 25 Ala. 60; *Horton v. State*, 53 Ala. 488; *Williams v. State*, 91 Ala. 14; *Olmstead v. State*, 89 Ala. 16. This principle disposes of the first three grounds of demurrer adversely to appellant.

There is nothing in the fourth assignment of demurrer. The complaint sufficiently avers that the plaintiff is a municipal corporation.

The fifth and sixth assignments of demurrer present the question of the power of a municipal corporation, incorporated under the general statute, to prohibit a sale of liquors at retail within the corporate limits. The language of the statute—Code of 1886, § 1500—is: "The corporate authorities of the town have the following powers: . . . 3. To license, tax, regulate and restrain . . . the retailing of spiritous, vinous and malt liquors within the corporate limits." The word restrain was first incorporated in this statute in the Code of 1886. Its primary meaning is to keep from action, to repress, to prevent, to debar. It is in the connection here used, the legal equivalent of the verb to prohibit, and authorizes municipal corporations incorporated under the general law to prohibit retailing of spiritous, vinous and malt liquors within their limits.

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The Circuit Court did not err in overruling the demurrer to the complaint.

Affirmed.

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Action on Rent Notes.

1. *Action on rent note; right to maintain the same.*—A vendor of leased premises, who, under an agreement with his vendee, is to retain possession of the rent notes subsequently maturing, collect them as they mature, credit the vendee with the amount collected, and account to her therefor, has no beneficial interest in such rent notes, and can not maintain an action in his own name founded upon them.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

This was an action brought by the appellee against the appellant, and counted on several promissory notes, made by the defendant for the rent of certain property which was, at the time of the making of said notes, the property of the plaintiff. The defendant, by sworn plea, denied that the plaintiff was entitled to the proceeds, and that plaintiff did not own the debt evidenced thereby. The facts as disclosed on the trial of the cause are sufficiently stated in the opinion. The court, trying the case without the intervention of a jury, rendered judgment for the plaintiff; and from this judgment the present appeal is taken, and the same is assigned as error.

MCLEOD & TUNSTALL, for appellant. An agent who has promissory notes for collection merely, has no such beneficial interest in them as would entitle him to bring suit.—*Pleasants v. Erskine*, 82 Ala. 386; *Nabors v. Shippey*, 15 Ala. 293; *Bancroft v. Paine*, 15 Ala. 834; *Bryant v. Owens*, 1 Porter 201; *Newbold v. Wilson*, Minor 12.

MATTHEWS & WHITESIDE, *contra*, cited *Hirschfelder v. Mitchell*, 54 Ala. 423; *Yerby v. Sexton*, 48 Ala. 311.

HEAD, J.—The evidence shows, without conflict, that when plaintiff, S. P. Ingram, sold the real estate to Mrs.

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Cooper, for the rent of which this suit is brought by Ingram against Moses, his tenant, it was expressly agreed (as well as it was implied by law) that the rents, afterwards maturing under the lease to Moses, passed to and became the property of Mrs. Cooper, the purchaser; and it was agreed that Ingram, who had possession of the rent notes, should retain and collect them as they matured, and give Mrs. Cooper credit for the amounts collected, and account to her for the same. There is no evidence that Mrs. Cooper owed Ingram any thing; hence the notes were not retained by him as collateral security. After Mrs. Cooper thus acquired the ownership, there was left in Ingram no beneficial interest whatever in the rents, or the notes given by Moses therefor; but the effect of the arrangement was to constitute him her agent, merely, to collect and account to her. The statement of Ingram, as a witness, that he was the owner of the notes, was a conclusion, repelled by the undisputed facts, and counts for nothing. Not being the real owner, and the notes being, as the record shows, non-commercial in their character, Ingram can not maintain the action. It should have been brought in the name of Mrs. Cooper, the real owner. The ownership was put in issue by sworn plea as the rule requires.

The judgment of the City Court is reversed, and a judgment will be here entered in favor of the appellant.

Reversed and rendered.

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Action of Assumpsit.

1. *Attorney liable for money had and received.*—An attorney who has collected a certain sum of money due his client, a part of which he and his client are under obligation to pay to a third party, is responsible to said third party for money had and received, to the extent of the portion to which he is entitled.

2. *False representation; estoppel.*—Where one represents to another that he has money in his possession which is claimed by the latter, but says he will not pay it over until the conflicting claims thereto have been decided by the courts, and by reason of such a representation the latter is induced to institute suit for the recovery of the money, the former is estopped from saying in the action so induced that he did not, in fact, have the money.

3. *Contract to await result of contest.*—Where an attorney agrees or contracts to hold a certain sum of money collected for his client “to

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await the result of a contest as to the validity of a claim for that sum," to be instituted by a third person, an action for money had and received brought by said third person against the attorney is such a contest as was contemplated by the contract, since the client could have supervened as a claimant.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, J. E. Byars, against the appellant, D. F. Myers; and sought to recover \$1000.00, which was alleged to be due the plaintiff. The complaint contained only the common counts.

The evidence, as is shown by the bill of exceptions, established the following facts: One J. L. Landrum owned ticket number 93,890 in the April, 1889, drawing of the Louisiana State Lottery; J. E. Byars purchased said ticket, or an interest therein, from Landrum; the said ticket drew a prize in the drawing of the Louisiana State Lottery, which entitled the owner thereof to \$5,000.00. Landrum then claimed to be the sole owner of said ticket; Byars resisted this claim. The said ticket was lost, and D. F. Myers, as attorney for J. L. Landrum, agreed that he, for the said Landrum, would pay Byars \$1,000.00 out of the \$5,000.00 to which the ticket entitled them, if Byars would withdraw his claim to said ticket, and would aid the said Landrum in collecting the amount drawn thereby, by testifying as to the loss of the same. In accordance with this agreement, Byars made an affidavit that he had purchased said ticket from Landrum, but that Landrum was the owner of the ticket; that said ticket was lost; and in said affidavit he authorized the payment of the said \$5,000.00 drawn by said ticket to D. F. Myers. He also, at the same time, released all interest in the ticket, except as to the \$1,000.00 above referred to. Some time afterwards the said Landrum commenced a suit in New Orleans against the Lottery Company to recover the \$5,000.00 alleged to have been drawn by the ticket. Interrogatories in the said suit were propounded to the said J. E. Byars and one Bryant. After having heard the answers given by said Bryant to the said interrogatories, Byars refused to testify to the same things, saying that Bryant had not told the truth. Thereupon Myers informed Byars that Landrum would no longer be bound by the agreement to pay the \$1,000.00, and Byars, through his attorney, interposed a claim in the suit of Landrum against the Lottery Company, by what is known in Louisiana as an "Intervention." After this intervention was filed, another agreement was entered into, on February 13, 1890, between the said J.

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E. Byars and D. F. Myers, in which it was agreed that D. F. Myers was "to hold the sum of one thousand dollars (\$1,000.00), of the amount claimed from the Lottery Company, to await the result of the contest as to the validity of the claim for that sum, to be instituted in the courts of Jefferson county, Alabama, by J. E. Byars." Byars' intervention was withdrawn, and after the recovery of the \$5,000.00 by Landrum, which was paid to Myers, he refused to pay the \$1,000.00 to Byars, saying, "I have received the said \$1,000.00, and neither you nor Landrum can get it until the court determines who is entitled to it." After this conversation, J. E. Byars brought the present action against D. F. Myers to recover the \$1,000.00.

The defendant, as a witness in his own behalf, testified, that the statements made about the receipt of the \$1,000.00 were made in jest; and that as a matter of fact he had never received the said \$1,000.00, which was agreed to be held by him to await the decision of the court to determine whether Byars or Landrum was entitled thereto.

The cause was tried without the intervention of a jury, and after hearing all the evidence the court decided, as is recited in the bill of exceptions, "that because defendant, Myers, had admitted, as testified to by plaintiff and J. L. Meade, 'that he had received the \$1,000.00, and that neither plaintiff nor Landrum could get it until the court determined who was entitled to it,' the defendant was thereby estopped from denying, or introducing testimony to prove, that the said money had never come into his possession, nor was ever received by him; and that under the proof, the plaintiff was entitled to recover, and accordingly entered up judgment against the defendant in favor of plaintiff for said sum and costs of this suit." From the judgment so rendered the defendant appeals, and assigns the same as error.

CUMMING & HIBBARD, for appellant.—The doctrine of estoppel does not apply in this case.—*Larkin v. Mead*, 77 Ala. 485; *Turnipseed v. Hudson*, 50 Miss. 429; *Flower v. Elwood*, 66 Ill. 438; 2 Herman on Estoppel, §§ 781, 905.

HEWITT, WALKER & PORTER, *contra*.—Defendant is estopped from denying that he had received the \$1,000.00 for the plaintiff.—*Meister v. Birney*, 24 Mich. 435; *Robb v. Shephard*, 50 Mich. 189; 2 Herman on Estoppel, §§ 752-764.

McCLELLAN, J.—It seems clear to us that the evidence in this case, aside from the agreement between Landrum

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and Byars and between their attorneys, Myers and Fellows, the plaintiff below was entitled *ex æquo et bono* to one thousand dollars of the five thousand dollars recovered from the Louisiana State Lottery Company. If Myers had the money to which plaintiff was entitled he was liable to an action for money had and received. If Myers did not have the money, but represented to plaintiff that he did have it, but would not pay it over until conflicting claims thereto were adjudicated by the courts, and by such representation induced plaintiff to believe the money was held by him, and the plaintiff brought this suit on the faith of such representation, and thereby subjected himself to the costs and expenses incident to the prosecution of the action, all of which we find to be facts, Myers was estopped to say in the action thus induced, if not indeed invited, that he did not in fact have the money.—Bigelow on Estoppel, 550; *Meister v. Birney*, 24 Mich. 435; *Robb v. Shephard*, 50 Mich. 189; *Stevens v. Ludlum*, 13 L. R. A. 270, note.

The agreement referred to, that of February 13, 1890, contemplated and provided for a contest in the courts of Jefferson county to determine certain conflicting claims of the plaintiff in this action and one Landrum to the fund now in controversy, and a decision thereof in plaintiff's favor as a condition upon which the defendant would pay the money to plaintiff. We are of the opinion that this suit, in which Landrum might have supervened as a claimant, fills the terms of this agreement, and is the contestation contemplated therein.

It appears, however, that plaintiff had received one hundred of the thousand dollars to which he was entitled in the payment of a fee which he owed to J. L. Meade. The judgment below should have been, therefore, for nine hundred, instead of one thousand, dollars. It will be so modified here; and, as modified, will be affirmed.

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Proceeding to quash Execution on a forfeited Replevy Bond.

1. *Replevy bond; executed by defendant in possession.*—When, under a writ of seizure in a detinue suit against several defendants, the property is found in possession of only one of them, a replevy bond by the defendant in possession as required by statute (Code, § 2717) is sufficient, without the other defendants joining therein.

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2. *Same; validity thereof.*—The fact that a part of the property sued for and included in the replevy bond is omitted from the sheriff's return of seizure, or that certain articles of property not sued for are included in the bond, can not affect the validity of such bond. The obligation of a replevy bond is to deliver as much of the property sued for and replevied as the plaintiff shall recover by verdict and judgment.

3. *Same; penalty enforced by summary execution.*—Although the penalty of a forfeited replevy bond is less than the value of the property, as assessed by the jury, it can be enforced by summary execution against the sureties for the amount of such penalty.

APPEAL from the City Court of Birmingham.

Heard before the Hon. H. A. SHARPE.

This is an appeal from a judgment rendered in the City Court of Birmingham quashing an execution issued on a forfeited replevy bond. The bond was given by Verona Rich, with Herman Lowenthal and Moses Lowenthal as her sureties, to retain possession of certain personal property for the recovery of which Herman Rich had instituted an action of detinue against the said Verona Rich and Louis Hecht and Robert Hecht. The plaintiff having made affidavit and given bond at the commencement of the suit, as provided by the statute, the clerk of the court made an indorsement on the summons requiring the sheriff to take the property mentioned in the complaint into his possession, unless the defendant gave bond therefor as required by law. The said Verona Rich, who had possession of the property sued for, thereupon executed a bond as above stated and kept the property. The penalty of this bond was in the sum of five hundred dollars, and the condition was as follows: "Now if the said Verona Rich shall well and truly, within thirty days after the determination of said suit, if the said Verona Rich be cast in said suit, deliver the property replevied, and also pay all the costs and such damages as may accrue from said detention, then this obligation to be void, otherwise to remain in full force and effect." On the trial of the detinue suit, a judgment was rendered in favor of the plaintiff against the said Verona Rich, the suit having been dismissed as to the other two defendants. In this judgment the plaintiff failed to recover some of the property described in the levy and in the bond. The alternate value of the property for which such judgment was rendered was assessed at \$714, and the damages for the detention was found to be \$1,456.05. None of the property having been returned and no part of the damages having been paid, at the expiration of thirty days from the rendition of the judgment, the sheriff made return of these facts, and the

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clerk thereupon issued an execution against the sureties on the bond for the sum of five hundred dollars. Thereupon, the said sureties began the proceedings in this case, by petition, setting forth the facts which are briefly stated above, and praying that the execution be quashed. A copy of the bond and also of the execution were attached as exhibits to the petition. The objections made in the petition to the validity of the bond as a statutory bond, and which are made the grounds of the motion to quash the execution were as follows: *First.* That the bond was not the bond of *all* the defendants in the suit, but of only one of them. *Second.* That certain property was mentioned as having been replevied which has not been levied upon and seized by the sheriff, and that two willow rockers were included in the bond when the same had not been sued for. *Third.* That the penalty of the bond was less than the alternate value of the property, as assessed by the jury trying the case, and that the statute only authorized the issue of an execution for such alternate value, and for the damages assessed for its detention. *Fourth.* That the bond should have been conditioned for the return of the property if the defendants, or any of them, were cast in the suit, and not if Verona Rich merely was cast in the suit.

Herman Rich, the plaintiff in the detinue suit, and respondent to this petition, demurred to the petition on the following grounds: 1st. The bond in the detinue suit was a statutory bond. 2d. The defendant, Verona Rich, had the right to execute the bond and replevy the property sued for, if the same was in her possession, without requiring the other two defendants to unite in the execution of said bond. 3d. There is no provision of law that all of the defendants must unite in the execution of the bond, when only one is in the wrongful possession of the property sued for. 4th. By the execution of the bond the defendants are estopped from denying that any of the property mentioned in the bond was seized by the sheriff. 5th. The fact that some of the property contained in the bond as having been replevied, when it was not sued for, is immaterial, and does not affect the validity of the bond.

The court overruled the demurrer of the respondent, and upon his "failing and declining to plead further," the court was of the opinion that the bond was not a bond on which execution might issue, and rendered judgment in accordance with the prayer of the petition quashing the execution.

CABANISS & WEAKLEY, for appellant.—1. There is no requirement of law that all the defendants must unite in the

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execution of a bond as a condition precedent to one of the defendants retaining possession of property sued for in an action of detinue. Such a contention is opposed to the spirit and policy of our laws in other similar cases. See Code, (1886), §§ 2717, 2918, 2964, 3004, 2522. 2. Petitioners have no right to complain that the penalty of the bond was too small, as they are in no wise injured thereby.—*Anderson v. Rhea*, 7 Ala. 104; *Jones v. R. R. Co.*, 6 Miss. (5 How.) 407; *Stevens v. Wallace*, 5 T. B. Mon. 404; *Trueblood v. Knox*, 73 Ind. 310. 3. The failure of the defendant to return any of the property replevied would have worked a forfeiture of the bond, and hence the fact that plaintiff failed to recover some of the property replevied could make no difference, so far as the sureties are concerned, if the value of the property that was recovered was as much as the penalty of the bond, as it was in this case. *Munter v. Lienkauff*, 78 Ala. 546; *Dunlap v. Clements*, 18 Ib. 778; *Bernard v. Scott*, 3 Ran. (Va.) 522; *Pleasants v. Lewis*, 1 Wash. (Va.) 353. 4. The bond was properly conditioned, that if the said Verona Rich should well and truly within thirty days after the determination of the suit, if the said Verona Rich should be cast in the suit, deliver the property replevied, &c. 5. When the substance of a bond is prescribed by statute, if the bond be so drawn as to include all the obligations imposed by the statute, and to allow every defense given by law, it will be valid though slightly variant from the form prescribed.—*Walker v. Chapman*, 22 Ala. 116; *Commissioner v. Way*, 3 Ohio 103; *Rhodes v. Vaughan*, 2 Hawks, (N. C.) 167; *Gardener v. Woodyear*, 1 Ohio 78; *Waters v. Riley*, 2 Har. & G. (Md.) 305; *Judges v. Deans*, 2 Hawks, (N. C.) 93; *Treasurers v. Bates*, 2 Bailey (S. C.) 362.

JAMES E. WEBB, *contra*, cited *Cobb v. Thompson*, 87 Ala. 381; *Rhodes v. Smith*, 66 Ala. 175; *Rose v. Pearson*, 41 Ala. 253; *Campbell v. May*, 31 Ala. 567; *Lowenstein v. McCaddie*, 14 S. W. Rep. 1095.

HEAD, J.—Our statutory action for the recovery of personal chattels in specie, Code, § 2717, *et seq.*, combines the qualities of detinue and replevin, as those remedies were understood at the common law. But one form and method of procedure are prescribed for any recovery of a chattel, whether the grievance be the mere wrongful detention resulting from a possession originating in contract, or an unlawful taking and detention; and to this procedure is adapted the machinery of the action of replevin for seizing the prop-

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erty, at the institution of the suit, and its custody, under bonds, to abide judgment upon the rights of the parties. Detinue and replevin, as they are distinguished from each other, are, practically, superseded by this statutory substitute designed to answer the aims and ends of both. So combined, the beneficial incidents of either of the old remedies will be held to attach to the new system. If the goods were unlawfully and tortiously taken and detained, for the redress of which according to the early notions of detinue and replevin, the latter was the appropriate remedy, a plaintiff, suing several in one action, might recover against one or more defendants and fail as to the others, as in other actions of tort. This incident must be now held to attach to any action, under our statute for the recovery of chattels.

From this standpoint, there can be no doubt that when suit is brought against several, and the appropriate mandate obtained for the seizure of the goods, it is the duty of the sheriff to execute the mandate though the goods be found in the possession of, and exclusively detained by, one of the defendants only; and this being true, it follows, as a necessary consequence, that the defendant in possession may retain possession by the execution of the replevy bond authorized by the statute; for, in such case, the other defendants, who may be improperly sued, and who may successfully defend upon the mere denial of the detention, have no concern with the seizure, and no interest to prompt them to join in the execution of the bond. It is no strained, but a fair, construction of the words of the statute, to hold, as we do, that the defendant, authorized to execute bond and retain possession, is he who is in possession and detaining the property; he whose possession would be disturbed by the execution of the process of the court. Indeed, it may be open to serious inquiry whether the other defendants who are not in possession, are clothed with a legal right to join in the replevy; since its effect would be to convert into the common custody and possession of them all, that which was, exclusively, in the defendant found in possession. It may be readily perceived how the rights of a real owner in possession, might be subverted by such enforced transfer of custody, without any provision of means of indemnity. That question does not arise, however, and we pronounce no decision upon it.

Manifestly, the fact that a part of the property sued for and included in the replevy bond was omitted from the sheriff's return of seizure, can exert no influence upon the statutory character of the bond. Nor does the fact that cer-

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tain articles of property not sued for, were included in the bond, affect it. Such inclusion could not possibly prejudice any right, or work any conceivable harm. It is a mistake to suppose, as argued by counsel, that the bond requires the obligors, necessarily and at all events, to deliver all the property mentioned in it, after judgment. Interpreted in the light of the several provisions of the statute under which it is given, the obligation is to deliver the property sued for and replevied, and which the plaintiff shall recover by verdict and judgment. It is not denied that a plaintiff in this action may recover a part of the property sued for and replevied, and fail as to the residue. As well might it be argued, in that case, that the bond requires the delivery of all the property mentioned in it, yet unquestionably it does not. When the penalties of the bond come to be enforced by return of forfeiture and execution prescribed by the statute, the officers must read it in connection with the record, and thereby ascertain what property was condemned to delivery, and ought to have been delivered. If the willow chair was not sued for, it could not have been recovered, and no obligation could rest upon the obligors to deliver it.

It is next insisted that the execution should be quashed because the statute requires that it shall issue for the alternate value of the property, as assessed by the jury, whereas, this execution issued for a sum less than that value, being the amount of the penalty of the bond. The proposition is, that where the penalty is less than the assessed value, the bond can not be enforced by summary execution. We think this construction of the statute too narrow. We can see no possible detriment or inconvenience to result to any one from a summary enforcement of the bond to the extent of the penalty when the assessed value is greater, which would not be suffered if enforced for the assessed value, when the penalty is greater. The purpose of the statute, in requiring the bond and providing the processes for its enforcement, was to furnish, upon the obligation of sureties, a speedy, efficacious and inexpensive remedy for compelling delivery of the property, on its recovery by judgment, or payment of its alternate value, so far as the obligation of the sureties may be the means of effecting that result. The statute must be given a liberal interpretation, so as to accomplish the remedial objects intended. It is a fair construction, therefore, of the provision requiring the execution to issue for the assessed value, to impose upon it the implied limitation that the execution shall not exceed the penalty of the bond, that being the measure of the obligor's

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liability. It has been the practice in this state to pursue the course here pursued, in analogous cases; and we are not aware that any objection has ever been raised to it. For instance, by statute in cases of appeals to the Circuit Court from judgments of justices of the peace, it is required that, on affirmance of the judgment in the appellate court, judgment shall be rendered against the sureties on the appeal bond, as well as the principal, for the amount recovered and all costs. This judgment, as to the sureties, is purely summary, and yet it has for many years, and frequently been held by this court, that if the sum recovered and costs exceed the penalty of the bond, judgment should properly be rendered against the sureties for the amount of the penalty only.—*McBarnett v. Breed*, 6 Ala. 476; *Witherington v. Brantley*, 18 Ala. 197; *McKeen v. Nelms*, 9 Ala. 507; *Sherry v. Priest*, 57 Ala. 410; *Waite v. Ward*, 93 Ala. 271. A literal construction of the statute, such as appellees' counsel contends for, would in such a case, deny to the Circuit Court the power to render any judgment at all against the sureties on the appeal bond.

We are of the opinion that none of the grounds of the motion to quash the execution were well taken. The judgment of the City Court is reversed, and a judgment will be here rendered overruling the petition and motion to quash.

Reversed and rendered.

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Statutory Trial of Right of Property.

1. *Pledge of warehouse receipt; title acquired*.—Where a warehouse receipt given in the name of a factor for cotton stored by him recites the name of the owner, and is afterwards transferred by the factor as collateral security for a note, on which note is indorsed that such "cotton has been advanced upon * * * to its full value" by the factor, the pledgee in receiving the receipt has the equivalent of notice of the true state of the account between the owner and the factor, and becomes the purchaser of only such interest and claim the factor could assert.

2. *Same; not governed by section 1178 of Code*.—Such interest acquired with such notice, is in no sense the character of interest section 1178 of the Code intends to secure and protect in an endorsee of a warehouse receipt.

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APPEAL from City Court of Selma.

Tried before Hon. H. S. D. MALLORY, Special Judge.

The appellee, W. R. Lee, brought an action of detinue against Phillips & Parrish, warehousemen, to recover five bales of cotton. The cotton was taken in possession by the Sheriff under the writ of detinue, and the Commercial Bank of Selma, as provided by the statute, interposed its claim thereto. Issue was duly formed for the trial of the right of property, and upon the trial judgment was rendered for plaintiff. The facts and circumstances of this case are identical with those of the case of *Commercial Bank v. Hurt*, ante p. 130, and the litigation grew out of the same transaction, on the part of the H. C. Keeble Co., which is stated in that case as above reported.

DAWSON & PITTS, for appellants.—The same brief was filed, and the same points raised as in the case of *Commercial Bank v. Hurt*, supra.

Gaston A. Robbins and J. H. Stewart, contra, cited the same cases as they did in the case of *Commercial Bank v. Hurt*, supra.

STONE, C. J.—This case is in all material respects precisely like the case of the *Commercial Bank of Selma v. Hurt*, ante, p. 130, decided on a former day of this term—opinion by Walker, J. In that opinion all the facts material to a consideration of this case are presented and commented on.

The claim of the Commercial Bank in the present suit is the same as that asserted by it in its suit against Hurt. In this case the asserted claim to the cotton in controversy is by virtue of the identical indorsement of cotton receipts by the H. C. Keeble Company, which was relied on in that case. The alleged transfer was indorsed on the back of the note which the H. C. Keeble Company gave the Commercial Bank of Selma; and is in the following words: "We hereby transfer two hundred and ninety-eight bales of cotton, marked, numbered and stored as shown in the warehouse receipts, which are herewith transferred and delivered as collateral for the within note, which cotton has been advanced upon by us to its full value; and we hereby authorize the Commercial Bank of Selma to take actual possession of the same at any time they may desire, and to sell the same without notice, at public or private sale, applying the proceeds to the credit of this note." Signed, "*H. C. Keeble Co.*"

Accompanying the indorsement the Keeble Company delivered to the bank warehouse receipts for the cotton

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which is the subject of this suit. Those receipts were signed by warehousemen, and in them they acknowledged they had received the cotton from H. C. Keeble Company for storage, at the same time announcing therein that W. R. Lee was the shipper. The receipts also stated that the name W. R. Lee was marked on the cotton. It was an uncontroverted fact on the trial that H. C. Keeble Company was engaged in the sale of cotton as factors for their customers. There was no testimony offered tending to prove the truth of the recital in the indorsement, that H. C. Keeble Company had made advances on the cotton in controversy.

The claim of the Commercial Bank is rested mainly on section 1178 of the Code of 1886, which reads as follows: "The receipt of a warehouseman, on which the words 'not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred, must be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person." This section of the Code of 1886 was doubtless taken from section 6 of the act "To prevent the issue of false receipts," &c., approved February 28, 1881. Sess. Acts, 1880-81, p. 133. The rendering of the statute in the Code of 1886 is not a literal copy of the original statute. Possibly it was the intention to embody the same idea. As expressed in the Code, it may admit of question whether its language is broad enough to place the first indorsee of a warehouse receipt on the high ground claimed for him in this suit. Literally, that statute creates the presumption of ownership in the first indorsee so far only as to give validity to any pledge, lien or transfer made or created "by such person." This language, if interpreted by grammatical rules, only authorizes the person to whom the warehouse receipt is indorsed to pledge or transfer it; and only upholds the binding efficacy of such pledge or transfer, when made by the indorsee. Thus interpreted, the Commercial Bank can claim no benefit or advantage under that statute, because the pledge or transfer was not made by an indorsee of the warehouse receipts. Possibly the original statute, as enacted by the legislature, is susceptible of a broader interpretation. We need not, however, decide this question. We prefer to place our decision on a different principle.

It will be remembered that in the indorsement on the note, by which the Keeble Company transferred to the Commercial Bank all the title or interest the latter can or does assert to the cotton, is the following language:

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"which cotton has been advanced upon by us to its full value." This language clearly and unmistakably shows that the Keeble Company was not the owner of the cotton in absolute right, but that they only claimed to have advanced upon it to its full value. This was notice to the bank that the Keeble Company was not the owner of the cotton, but that it asserted a lien upon it by virtue of advances alleged to have been made by it to the owner. And this notice was strengthened by the recital in the warehouse receipt that Lee was the shipper of the cotton. If this pertinent information had been followed up, the Commercial Bank could not have failed to learn the true title and *status* of the cotton. Notice, sufficient to put one on inquiry, is notice of all that such inquiry will naturally lead to. This leads us to the inevitable conclusion that the bank, in receiving the transfer of warehouse receipts, received them with the equivalent of notice of the true state of the account between the owner and shipper of the cotton and the Keeble Company, the factor for its sale. From this it follows that the bank became the purchaser, not of the cotton, but only of the interest and claim which the Keeble Company owned and could assert. Such interest, acquired with such notice, is in no sense the character of interest which section 1178 of the Code intends to secure and protect in an indorsee of a warehouse receipt. It rests not upon the strength of the indorsement made, but in the confidence the indorsee entertains in the assurance that the cotton had been advanced upon to its full value. The transaction does not fall within the influence of the statute invoked in its support. As said by Mr. Justice Bronson, in discussing this subject in a leading case, "It is impossible to suppose that the legislature intended a factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances upon the goods, knew that he was not dealing with the true owner." *Stevens v. Wilson*, 6 Hill. 512; s. c., 3 Denio, 472; *Warner v. Martin*, 11 How. 209; *Covell v. Hill*, 6 N. Y. 374; *Cartwright v. Welmerding*, 24 N. Y. 521; *Dows v. Greene*, 24 N. Y. 638; *Howland v. Woodruff*, 60 N. Y. 73; *Allen v. St. Louis Bank*, 120 U. S. 20; *Shaw v. R. R. Co.*, 101 U. S. 557.

There is no error in the record.

Affirmed.

HARALSON, J. not sitting.

[Goldthwaite v. Ellison.]

Goldthwaite v. Ellison.

Bill in Equity to have Certain Conveyances by Insolvent Debtors declared Parts of General Assignment.

1. *Breach of trust; trustee in invitum.*—When a receiver, duly appointed by a Chancery Court, makes an unauthorized disposition of the trust fund confided to him to a person cognizant of the breach of it, who invests the money, such person becomes a trustee *in invitum* of such fund, and if the money can be traced into specific property a trust will attach to such property.

2. *Same; participation therein does not create a lien on other property.* The fact that a partnership firm in contracting a debt with a receiver, who is a member of such firm, participates in a breach of trust by the receiver, does not fasten a lien on the firm's property for the payment of such debt.

3. *Mortgage by insolvent partnership; part of its general assignment.*—A partnership that has borrowed trust funds from one of its members, who was the receiver in a chancery cause, without giving a mortgage on real estate as required by order of court, can not, on the day of making a general assignment for the benefit of its creditors, prefer the said receiver, by giving to him a mortgage on a part of the firm's property, although in pursuance of an agreement to give such mortgage, alleged to have been entered into when the loan was made; and a mortgage given under such circumstances will be construed to be part of the general assignment.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

On July 6, 1891, Moses Bros., who at that time, were engaged in the banking business in Montgomery, being insolvent, made a general assignment for the benefit of all their creditors. Among their creditors was H. C. Moses, (one of the firm of Moses Bros.), as receiver, appointed by the Chancery Court of Montgomery county, in the case of *Paull v. Knox*. To H. C. Moses, as receiver, Moses Bros. owed about \$17,000.00. On the same day, July 6, 1891, Moses Bros. executed to the said H. C. Moses, as receiver, a mortgage on certain real estate to secure said indebtedness to him, at the same time they executed the general assignment of all their other property for the benefit of their creditors. H. S. Ellison and others, who were creditors of Moses Bros., filed the present bill in the Chancery Court of Montgomery county to set aside the alleged preference thus given to H. C. Moses, as receiver, and to declare the mortgage a part of the general assignment. H. C. Moses, as re-

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ceiver, set up in defense of said suit, by plea, that he had received the money from the Chancery Court of Montgomery county with instructions to lend the same, secured by mortgages on real estate; that he informed the said Moses Bros. of this instruction, and that they agreed to borrow the said money from him, and to execute to him a mortgage on real estate to secure the same, but they failed to do so until the morning of July 6, 1891, when they executed the mortgage above referred to. The sufficiency of this plea being questioned, the Chancery Court held it sufficient; and an appeal being prosecuted by H. S. Ellison and others, this court held the plea insufficient; and also declared the said mortgage to be a part of the general assignment. H. C. Moses then resigned his position as receiver, and Robert Goldthwaite, the present appellant, was appointed in his stead. The said Goldthwaite filed a new plea which set up practically the same defense as the plea of Moses, and demurred to the original bill. Said Goldthwaite also filed a cross bill. The purpose of the cross bill was, first, to enforce as a legal preference the mortgage given by Moses Bros. to H. C. Moses, as receiver; and failing in that, second, to enforce a lien upon all of the property, real and personal, assigned by Moses Bros. for the benefit of all their creditors. The ground of the cross bill was that the funds loaned them by H. C. Moses, the said receiver, were trust funds, which were received by said Moses Bros. with the knowledge of their trust character, and confused by them with their own property so that the same could not be followed or identified. There was a motion made to dismiss the cross bill for the want of equity, and a demurrer was also interposed thereto assigning the want of equity in several respects.

On the submission of the cause, the chancellor overruled the demurrer to the original bill; sustained the demurrer to the cross bill, and also the motion to dismiss the same, and held the plea of the receiver Goldthwaite insufficient. The present appeal is prosecuted by said Goldthwaite, and this decree of the chancellor is assigned as error. All the other facts of the case are substantially the same as they were when the case was here on former appeal, reported as *Ellison v. Moses*, in 95 Ala. 221.

SEMPLE & GUNTER, and H. C. TOMPKINS, for appellant.—When a mortgage is given in fulfillment of a promise made for a consideration passing at the time of the promise, the mortgage, though not executed at the time, is, when executed, the same as if made at the time of the promise, so

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far as the parties themselves are concerned. *Holt v. Bancroft*, 30 Ala. 193; *Ex parte Walker*, 25 Ala. 81; *Cartwright's Case*, 114 Mass. 230; *Una v. Dodd*, 39 N. J. Eq. 173; *Eikenberry v. Edwards*, 56 Am. Rep. 360; *Carpenter v. McBride*, 52 Am. Dec. 219; *Lathrop v. Bampton*, 89 Ib. 141; Pom. Eq., 1046-7-8; *Ex parte Ford*, 16 Q. B. D. 307; Jones on Mort., §§ 163-4; Code, § 3589; *Wilson v. Sheppard*, 28 Ala. 623; *Lee v. Lee*, 77 Ala. 412; *Mosely v. Norman*, 74 Ala. 425; *Vincent v. State*, 74 Ala. 282; 94 N. Y. 339-341. A contract being fully executed on one side, it is to be regarded, in equity, as having been executed on the part of the debtors upon the date of the promise which called for immediate security.—1 Story's Eq. Jur., § 64g; *Jacques v. Miller*, 22 Moak's Rep. 728; *Paulding v. Steel Co.*, 94 N. Y. 334.

HORACE STRINGFELLOW and THOS. H. WATTS, *contra*.—1. The agreement of Moses Bros. to give a mortgage to H. C. Moses, as receiver, to secure his loan to them, was insufficient to prevent the mortgage subsequently executed from being made a part of the general assignment, by operation of section 1737 of the Code.—*Thompson v. Gordon*, 72 Ala. 455; *Adams v. Johnston*, 41 Miss. 258; Jones on Mortgages, § 163; Pomeroy Eq. Jur., §1235, and note 2; *Carr v. Passaic Land, Improvement & Building Co.*, 22 N. J. Eq. 85; *Ellison v. Moses*, 95 Ala. 221; *Rochester v. Armour*, 92 Ala. 432; *Holt v. Bancroft*, 30 Ala. 125; *White v. Colzhausen*, 120 U. S. 329; *Wyeth Hardware Co. v. Standard Imp. Co.*, 47 Kan. 423. 2. The receiver did not have any right, claim or interest to the property owned by Moses Bros., and could not fasten a lien upon such property to the extent of the amount loaned them. *Phares v. Leachman*, 20 Ala. 683; *Mauzy v. Mason*, 8 Porter. 211; *Goldsmith v. Stetson*, 30 Ala. 164; *Stewart v. Fry*, 3 Ala. 578; *Martin v. Branch Bank*, 31 Ala. 115; *Case, Receiver v. Beauregard*, 1 Woods 125; *Denton v. Davies* 18 Ves. 504; *Lee v. Lee*, 55 Ala. 593; s. c. 67 Ala. 422; Perry on Trusts, §§ 841, 842; *Ex parte Jones*, 77 Ala. 333; *Peters v. Bain*, 133 U. S. 670; *Ellison v. Moses*, 95 Ala. 221.

STONE, C. J.—It is certainly true that a receiver appointed by the Chancery Court is charged with a trust that is very exacting in its required duties. It is equally true that the court making such appointment is armed with large powers to compel a faithful performance of the duties intrusted to him, and to punish any dereliction of which the receiver may be guilty. And when a receiver thus appointed makes an unauthorized disposition of the trust fund confided to

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him, to a person cognizant of the breach of duty, such person receives the fund charged with the trust, and constitutes himself a trustee *in invitum* for its safe return.—*Lee v. Lee*, 58 Ala. 406. We need not decide to what extent, if any, the person to whom the receiver improperly confides the trust fund, thereby places himself under the jurisdiction and power of the Chancery Court. He is not the constituted agent, or appointee of the court, and does not, by such act, make himself a party to the suit. It would seem that he is beyond the reach and power of the court in that suit; for, as a rule, courts can make no orders which affect strangers to the litigation before them.

Under the averments of the bill before us, and of the plea filed by the receiver, there was a clear breach of trust on the part of the first receiver, in parting with the money without requiring the security the chancellor ordered him to take, and he thereby exposed himself to be dealt with personally.—*Ex parte Walker*, 25 Ala. 81; *Ex parte Hamilton*, 51 Ala. 66; *Ex parte John Hardy*, 68 Ala. 303. In addition, he fastened a personal liability on himself to account for the money; and the borrowers, if chargeable with a knowledge of the violated duty, incurred a similar pecuniary liability.

Giving to the averments of the plea their broadest extent, they fail to show that by the acts, conduct and declarations attending the loan of the money, the receiver acquired any title to, interest in, or lien upon the lot in controversy, or in or upon any other real estate Moses Brothers then owned. On the contrary, they show that their title, ownership and disposing power over their realty, and over every part of it, remained entirely unchanged, alike at law and in equity, until the mortgage was executed July 6, 1891. Till then, their debt, *as a debt*, was simply a promise to pay; and the fact that in contracting it they participated in a breach of trust, did not so change its nature as to fasten a lien on their property for its payment. Till then, Moses Brothers retained the absolute, unqualified power of disposition over their property, and every part of it, so far as the alleged agreement or understanding could affect it. Lien is never an incident of a contract, or money liability, unless made so by the terms of the contract, or by some rule of law.—13 Amer. & Eng. Encyc. of Law, 574-5. We do not think the amended plea makes any material change in the legal bearings of the question.

An ingenious and exhaustive argument has been submitted for appellant. It certainly shows a case of hardship, but it fails to convince us that there was power in any court

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to compel a compliance with the agreement or understanding set up in the plea. Had the money been traceable into specific property, a trust would have attached to such property, so long as it could be shown that the title to such property was acquired with knowledge, actual or constructive, of the violated trust. This, not because the trust grew out of the chancellor's appointment of the receiver. It would rest on the broad, general, equitable doctrine, that one who acquires property with a knowledge that trust funds were misapplied in its acquisition, thereby constitutes himself a trustee *in invitum*, and makes the fund misapplied a charge on the property. And it acquires no additional force or enlargement of its scope, from the fact that the trust was of judicial creation, so far as the mere right to trace the money is concerned. The only additional power the court was armed with in the present case, was that it could deal *in personam*. Beyond that, it had no greater power to compel the giving of security, than if the loan had been made by an agent or trustee of private appointment, under an agreement or understanding, such as is alleged in this case. It is too indefinite to be characterized as a contract, and specifically enforced as such.

We consider it unnecessary to again collate, or cite the authorities. That was carefully done on the former hearing. *Ellison v. Moses*, 95 Ala. 221; 11 So. Rep. 347. The question was very fully considered at that time, was much discussed, and the conclusion reached was the unanimous opinion of the court. We think that to depart from it would seriously impair the benefits of a wise and wholesome statute, and might lead to results we should strive to avoid. We adhere to that opinion.

Affirmed.

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Action by Passenger against a Railroad Company, for Damages on account of Personal Injuries.

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121	100
99	501
125	348
99	501
136	248

1. *Liability of defendants as joint tortfeasors.*—In an action against two or more defendants, seeking to hold them liable as joint tortfeasors, responsible jointly and severally for the resulting injury, the wrong complained of must, in fact, be jointly done by the defendants, or if

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contributed to by each, a joint purpose must be imputable to each of them.

2. *Judgment against one of two defendants, when sued for the same tort.* Where, in an action for injuries against two railroad companies, the complaint alleges the joint and several liability of the defendants for the result of their separate and distinct, but concurring and co-acting negligence, and the sufficiency of the complaint is not tested by demurrer, but both the defendants plead the general issue, judgment may be properly rendered against one of the defendants and in favor of the other.

3. *Motion to require plaintiff to submit to physical examination; must be seasonably made.*—A motion to require the plaintiff to submit to a physical examination must be seasonably made; and such motion should not be granted if the result would be an unreasonable postponement of the trial, or if it would necessitate the plaintiff's presence in Alabama, when it appears that he was not reasonably equal to the journey from his home in a distant State.

4. *Struck Jury.*—When, in an action against two defendants, each demands a struck jury, under section 2752 of the Code, they are not entitled to separate panels; but a list containing the names of 24 jurors in attendance upon court must be furnished to the parties defendant.

5. *Objection to answers to interrogatories.*—When depositions of witnesses are taken on interrogatories, and no objections are filed to such interrogatories, objections to the answers, if responsive, come too late when raised during the trial, and are properly overruled.

6. *Punitive damages.*—In an action against two railroad companies for injuries caused by a collision, at a point where the two roads intersect, when there is evidence tending to show that the speed of one of the trains at the time of the accident was 30 or 40 miles per hour, that such train was not brought to a full stop near the crossing, as required by statute, never slackened its speed when it approached such crossing, and that the engines of both trains were in plain view when the rapidly moving engine was 150 feet away from the crossing, it is open to the jury to conclude that there was wantonness, wilfulness and reckless indifference to probable consequences on the part of the engineer on such engine, and the question of punitive damages is properly submitted to the jury.

7. *Same; actual knowledge of danger not necessary to recover such damages.*—If an engineer, who knows the location of the crossing of his road by another road, and that the physical conformation of the locality prevents his seeing trains on the other road, until too close to prevent a collision, unless he has complied with the statute requiring all trains to stop within 100 feet of the crossing, and he neglects to stop as required by statute, runs his train upon the crossing without even slackening its speed of thirty or forty miles per hour, and a collision ensues, he is guilty of such wanton and reckless conduct as imposes upon the railroad the liability for punitive damages, notwithstanding he may have had no actual knowledge of the approach of the train on the other road.

8. *Care and diligence required by railroads for passengers.*—The law requires of all railroad companies, and their employees, engaged in the carriage of passengers, the highest degree of care, diligence and skill known to careful, diligent and skillful persons engaged in such business.

9. *Duty of trainmen stopping at crossings.*—Trainmen, after stopping for a crossing, in obedience to the statute, must, before proceeding, make every effort, that the highest degree of care, skill and diligence

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requires, to be sure the way is clear and will remain so long enough for the passage of their train over the intersecting road; and this duty is not performed, when, before proceeding, the engineer is only "reasonably sure the way is clear," or has simply "endeavored, in good faith, to ascertain whether or not the way is clear."

10. *Trainmen's right to assume a compliance with the statute by the employees of an intersecting road.*—A charge that trainmen on one road, who have complied with the statute in approaching a crossing, may assume that trainmen on the intersecting road will also comply therewith, is not objectionable, as ignoring a duty which might have arisen after the train that complied with the statute had started, when given in connection with the further instruction, that the train that stopped had not the right to proceed over the crossing if the circumstances indicated that the other train would not stop.

11. *Charge invasive of jury's province erroneous.*—In an action against two intersecting railroads for injuries resulting from a collision of trains at their crossing, the alleged negligence being controverted by each, a charge asked by one of the defendants that assumes the negligence of the other, and submits to the jury only whether such negligence was the proximate cause of the injury, is erroneous, as invading the province of the jury.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, J. T. Greenwood, against the appellant, the Richmond & Danville Railroad Company, and the Savannah & Western Railroad Company; and sought to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on a train of the Richmond & Danville Railroad Company, by reason of a collision between two trains of the two defendants.

The pleadings are sufficiently stated in the opinion. The undisputed facts, as disclosed by the bill of exceptions, are as follows: On December 24th, 1889, the plaintiff was a passenger on one of the regular passenger trains of the Richmond & Danville Railroad Company, going from Birmingham eastward in the direction of Atlanta, Ga. When about 12 miles east of Birmingham, where the track of the Richmond & Danville road crosses the track of the Savannah & Western road, there was a collision between the passenger train, on which the plaintiff was riding, and a freight train on the Savannah & Western Railroad. Both trains were moving forward with their engines in front of them. The tracks crossed each other at this point at an acute angle. The Savannah & Western train was coming from the west towards Birmingham. The engineer of the passenger train was in his seat on the right of the engine, the fireman was putting coal in the engine, and a flagman, who had gotten on the engine, was sitting in the fireman's seat. The en-

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gineer and fireman of the freight engine were in their proper seats. The collision occurred in the day time. There was an embankment on the west or north side of the R. & D. track intervening between the two tracks and obstructing the view to some extent. This embankment was about 30 or 40 feet high at a distance of 200 or 300 feet up the R. & D. track, and gradually declined to a distance of about 11 feet high as it approached the crossing. There was a stop-post within a few feet of the R. & D. track, and about 100 or more feet from the crossing, to indicate where trains should stop on approaching said crossing. There was a similar stop-post near the S. & W. track, about 75 or 80 feet from the crossing. No person on the R. & D. engine actually saw or heard the approaching S. & W. train, until after the latter train had approached so near the track of the R. & D. railroad that the said R. & D. engine could not be stopped by the use of all possible means for that purpose.

The testimony for the plaintiff tended to show that the engineer on the R. & D. train had blown the whistle for the crossing, but did not come to a stop, or slacken the speed of the train, which was running at the rate of 35 or 40 miles per hour. The testimony for the defendant was in direct conflict with this portion of the plaintiff's evidence, and tended to show that the engineer did stop for the crossing, after blowing his whistle therefor, and that the speed of the train did not exceed 10 or 12 miles per hour.

The plaintiff was a resident of Greenville, in Hunt county, Texas, and was not present at the trial, but his testimony was taken by deposition. The other tendencies of the evidence are sufficiently shown in the opinion.

The trial of the cause was begun for February 5th, 1892. On January 28th, 1892 the R. & D. R. R. Co. entered on the motion docket a motion "to grant an order directing and requiring the plaintiff in this case to appear in person at the trial of the case, and to submit his person to a physical examination by medical experts to be nominated by the court, or selected by the parties or their attorneys." The grounds of the motion were, that the plaintiff was a resident citizen of Texas and sues to recover a large sum of money for personal injuries alleged to have been sustained by him while on the defendant's train; that he claims to have sustained permanent injuries in his head, spine, back and limbs, internal organs and nervous system; and that he has taken steps to have his own deposition taken, and the depositions of a large number of witnesses who reside in Georgia and

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Texas, so that defendants will be deprived of the opportunity to examine plaintiff and his witnesses face to face, and "will not be able to view or to exhibit to the jury the person of the plaintiff, so as to determine, with any degree of certainty, the truth or falsity of plaintiff's claim of permanent injury, or the truth or falsity of the testimony of plaintiff or his witnesses," and hence if the plaintiff does not appear at the trial in person gross injustice may be done to the defendant. In support of this motion the defendant, the Richmond & Danville Railroad Company, in open court, offered to defray all the necessary and actual expenses arising from the granting of said motion. On the hearing of said motion the court overruled the same, and the said defendant duly excepted.

When the cause was called for trial, one of the regular juries being in the jury box, each of the defendants, separately and severally, demanded the right to have a struck jury, as provided by section 2752 of the Code of 1886. There were 24 regular jurors in attendance upon court. The sheriff furnished each of the defendants a list of the 24 jurors in attendance, and thereupon each of the defendants separately demanded that six more jurors be empanelled and added to the 24 jurors, from which to secure a struck jury. The court refused the demand to add the six jurors, and the defendants then and there separately excepted. Each defendant then separately objected to strike from the list of 24 jurors so furnished, and assigned as its reason therefor, "that it was impracticable for each separate defendant to strike six men from said list of 24.

It is not deemed necessary to set out in detail all the rulings upon the evidence, since, as is stated in the opinion, they are not urged as grounds of reversal by counsel.

The Richmond & Danville Railroad Company separately excepted to the italicized portions of the following excerpts from the court's general oral charge: 1. "Now you will notice, gentlemen of the jury, that there are two defendants here, and the plaintiff claims that both of them are liable, but if both of them are guilty of negligence, as I shall explain to you, then both of them are liable. *If one was guilty of negligence and the other was not, then the company that is guilty of negligence is liable, and the other is not.*" 2. "When the tracks of two railroad companies cross each other, the engineers and conductors must cause their trains to come to a full stop within 100 feet of said crossing, and not proceed until they know the way to be clear; trains on the railroad having the older right of way being entitled to cross first.

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Now you will see from that, that if both roads had observed these precautions, it would be impossible for any collision to occur; each one coming up to within 100 feet of the crossing would stop and see that the way was clear and then proceed, it would be impossible for them to collide at the crossing. It would not be impossible, however, for a collision to occur when one road observes these precautions and the other road does not. The managers, engineers and conductors of trains are not required to do impossible things. What they are required to do is to exercise that reasonable degree of care that men in their situations, prudently conducting railroads and governed by this statute, would conduct themselves under the circumstances. For instance, if one train comes up to a point which is within 100 feet of the crossing and observes these precautions, and sees whether or not the way is clear, and there is no train in such distance, and if it then proceeds along after having stopped, and another train should come rushing along, not having observed these precautions, and going so swiftly, or perhaps around a curve, so that its approach could not have been seen by this first train, and a collision occurred, why then, you see that the first train has been guilty of no negligence, because it exercised all the care that it could have exercised. They stopped and saw that the way was clear, and the negligence would be on the other train, that did not observe these precautions, having caused the collision. Now one road has a right to suppose in its conduct that another road is going to observe the proper precautions. So then I mention that to you to show you that one road may be liable and another may not be liable." 3. "You will consider, whether or not either of the roads were guilty of any negligence. If neither of them were guilty of any negligence, why then there could be no recovery. If one of them was guilty of negligence, and the other was not, why then there should be no recovery against the one that was not guilty of the negligence." 4. "If both roads were guilty of negligence that contributed to the plaintiff's injury, then there should be but one verdict by you against both of the roads." 5. "If you believe that the plaintiff is entitled to compensatory damages, then you are to consider whether or not you will give him what is called vindictive damages, or punitive damages, which means punishment against the one they are imposed upon—are assessed for that purpose. They are in the nature of a punishment." 6. "Now if simple negligence is proven and only simple negligence is proven, then the damages could only be compensatory, but if willful neglect, or gross neglect is proven, then it is left to your judgment and discretion to say whether or not you will inflict punitive damages, that is damages to punish the defend-

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ant or defendants for the willful disregard of the safety of other people."

The Richmond and Danville Railroad Company requested the court give the following written charges, and separately excepted to the court's refusal to give each of them as asked. (1.) "There is no evidence in the case that the defendant, the Richmond & Danville Railroad Company, or its servants, were guilty of any wanton, reckless or intentional wrong, by which injury was inflicted upon the plaintiff." (2.) "If the jury believe the evidence they must find for the defendant." (3.) "If you believe the evidence in the case you can not assess any punitive damages against the defendant, the Richmond & Danville Railroad Company." (5.) "The expression used in the statute relative to the duty of an engineer at a railroad crossing, that he must not proceed 'until he knows the way to be clear,' does not mean that the engineer, in all cases, must know the way to be clear with absolute certainty. It only means that the engineer must be reasonably sure that the way is clear; that is, when the fact and circumstances, existing at the time and within his knowledge, are such as would reasonably induce a prudent person, in like situation, to proceed over the crossing." (6.) "The way over a railroad crossing is clear, within the meaning of this statute, if there is no obstruction on the crossing, or within actual sight or hearing of the engineer, before he proceeds to cross, if he has stopped the engine and attached train within one hundred feet of the crossing, and endeavored, in good faith, to ascertain whether or not the way is clear." (8.) "The defendant's engineer must have known that a train on the other defendant's road was approaching the crossing, otherwise he would not be guilty of wanton or reckless misconduct." (9.) "Unless the defendant's engineer had actual knowledge of the impending peril, of a collision at the crossing, he would not be guilty of such recklessness as would justify the imposition of punitive damages."

The court, at the request of the Savannah & Western Railroad Company, gave, among others, the following written charges to the jury: (5.) "If the jury shall find from the evidence that the Savannah & Western train, or those in charge of it, were guilty of an unintentional omission of duty, or of simple negligence merely, you can not find a verdict against it under the first and second counts of the complaint." (11.) "If the jury shall find that the proximate cause of the plaintiff's injury was the negligence of the Richmond & Danville Company, this is a circumstance for the jury to consider in de-

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termining whether the Savannah & Western Company was guilty of any negligence at all at the time of the collision." To the giving of each of said charges the Richmond & Danville Railroad Company separately excepted.

Upon the jury returning a verdict in favor of the plaintiff against the Richmond & Danville Railroad Company, assessing the plaintiff's damages at \$5,000, the Richmond & Danville Railroad Company moved the court to give judgment in its favor, notwithstanding the verdict of the jury, on the grounds, that the cause of action, as stated in the complaint, was based on the joint wrong of both of the defendants, and that the verdict of the jury is in favor of the plaintiff and against the Richmond & Danville Railroad Company, and "is, therefore, tantamount to, and operates as, an acquittal to the defendant, the Savannah & Western Railroad Company; that said finding and verdict is inconsistent with, and repugnant to, the averments of the complaint, and that, therefore, no judgment against the Richmond & Danville Railroad Company can be founded upon it." Upon the hearing of this motion the court overruled it, and the Richmond & Danville Railroad Company excepted to this ruling.

The present appeal is prosecuted by the Richmond & Danville Railroad Company, and the assignments of error cover the various rulings of the trial court to which exceptions were reserved.

JAMES WEATHERLY, for appellant.—(1.) The motion made by the defendant for a physical examination of the plaintiff's person should have been granted.—*A. G. S. R. R. Co. v. Hill*, 90 Ala. 71; 30 Cen. Law Jour. 442; *Anonymous*, 35 Ala. 226; *Newell v. Newell*, 9 Paige Ch. 25. (2.) The portions of the oral charge of the court to the jury, to which exceptions were reserved, were erroneous.—*Tanner's Case*, 60 Ala. 61; *R. R. Co. v. Blanton*, 84 Ala. 157; *R. R. Co. v. Hughes*, 87 Ala. 615. (3.) Mere negligence in not stopping within one hundred feet of the crossing, or in not ascertaining if the way was clear, is not sufficient to authorize a recovery of punitive damages.—*R. R. Co. v. Lee*, 92 Ala. 262. (4.) The general affirmative charge requested by the Richmond & Danville Railroad Company should have been given, upon the theory that the two railroad companies could not be held jointly and severally liable in this suit.—*Dyer v. Hutchins*, 87 Tenn. 198; *Trowbridge v. Forepaugh*, 14 Minn. 133; *Smith v. Smith*, 19 Wis. 103. (5.) Charge 5 requested by the appellant should have been given. Sec-

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tion 1145 of the Code of 1886 does not require or exact the impossible.—*R. R. Co. v. Hughes*, 87 Ala. 615.

DICKINSON & KERR, *contra*.—(1.) The court did not err in overruling the defendant's motions for a physical examination of the plaintiff's person. Plaintiff's deposition had been taken without objection by the defendant, and the short time from the date of the motion to the time of the trial made it impracticable.—*Turnpike Co. v. Bailey*, 37 Ohio 104; *Schroeder v. R. R. Co.*, 47 Iowa 375. (2.) The court properly refused to allow each of the defendants a separate panel for a struck jury.—*R. R. Co. v. Thompson*, 77 Ala. 448. (3.) The question of punitive damages was properly submitted to the jury.—*Phil. & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468; *S. & N. R. R. Co. v. McLendon*, 63 Ala. 266; *M. & C. R. R. Co. v. Askew*, 92 Ala. 5; 7 So. Rep. 823; *M. & E. R. R. Co. v. Mallette*, 92 Ala. 209; 9 So. Rep. 363; *Bir. Un. Rwy. Co. v. Hale*, 90 Ala. 8; 8 So. Rep. 143. (4.) Charges 5, 6, 8 and 9, requested by the appellant were properly refused.—*R. R. Co. v. Jacobs*, 92 Ala. 187. (5.) Charges 5 and 11, given at the request of the Savannah & Western Railroad Company were free from error. *Smith v. Collins*, 94 Ala. 394.

McCLELLAN, J.—This is an action by Greenwood against the Richmond & Danville Railroad Company and the Savannah & Western Railroad Company, sounding in damages for personal injuries alleged to have been sustained by the plaintiff in a collision between trains of the respective railway companies at a crossing of their respective tracks. The complaint contains three counts. The first and second aver that the collision was the result of negligence and wantonness, and the third counts on simple negligence. *Each of the three counts ascribes the injury complained of to the concurring wrong of both defendants.* Thus: The first count avers that the engine and train on the Richmond & Danville road belonged to and were in charge of and being operated by servants of that company; that the engine and train on the Savannah & Western road belonged to and were in charge of, and being operated by servants of that company, and that these servants "carelessly, negligently and wantonly ran the said engines and trains so under their charge, respectively, as aforesaid, into and against each other upon or near said crossing, and plaintiff was thereby, then and there thrown down and maimed, crushed and bruised," &c., &c., &c. The

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second count particularizes the negligence charged against the servants of the two defendants, averring it to have consisted on the part of the employees on each train, in a failure to sound the whistle and come to a full stop within one hundred feet of the track of the other road, and in their proceeding to attempt the crossing without knowing the way was clear, and then continues: "and by reason of said negligence on the part of said defendants the said engines and trains then and there collided with each other, upon or near said crossing and plaintiff was then and there thrown violently down and maimed, bruised and otherwise injured," &c. And the third count is substantially the first with the allegation of wantonness omitted: it avers that the injury complained of was caused by the negligence of the servants of both defendants.

It is to be observed that the complaint in each of its counts relies upon and seeks to recover on account of the separate and distinct wrongs of the defendants respectively: it seeks to enforce a joint liability for acts which were not joint in themselves nor bound together by the tie of a common purpose. It is a very general, if not in principle an universal, rule that this cannot be done: the wrong done must be jointly done in fact by the defendants, or if contributed to by each, a joint purpose must be imputable to them before they can be said to be joint tortfeasors, and responsible jointly and severally for the resulting injury as all joint tortfeasors are. It will not suffice, as a general proposition at least, that the separate wrongful acts or omissions of two persons, having no connection with each other, the motive of each being foreign to that of the other, have in their unintended coalescence and co-action produced an injury: joint and several liability cannot ordinarily be affirmed upon such a state of case. An exception to this general doctrine was virtually declared by the court of appeals of New York in the case of *Colgrove v. The New York & New Haven R. R. Co. and The New York & Harlem R. R. Co.*, 20 N. Y. 492, where it was held, Denio, J. dissenting, that a passenger injured by a collision resulting from the separate but concurrent negligence of two railroad companies, may maintain a joint action against both. This case has been followed several times in New York and by one or two cases in other States. See note to *Colgrove's Case*, 75 Am. Dec. 419. And its doctrine in a modified form is embodied in the text of the Am. & Eng. Encyc. of Law, in this language: "Tortfeasors cannot be sued jointly unless the tort has been committed by their joint act, or they are jointly guilty of the

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negligence or breach of duty causing the injury." Vol. 17, p. 602. The soundness of this exception to the general rule, for such it must be regarded, has been directly questioned, and is open to doubt.—*Lull v. F. & W. Imp. Co.*, 19 Wis. 100; *Troubridge v. Forepaugh*, 14 Minn. 133; *Larkins & Moore v. Eckwurz*, 42 Ala. 322; *Powell v. Thompson*, 80 Ala. 51. Whether sound or not, however, we need not decide in this case. The complaint here alleges a joint and several liability of these defendants for the result of their separate and distinct but concurring and co-acting negligence. Its sufficiency was not tested by demurrer; but both defendants pleaded the general issue, thereby admitting its adequacy as a charge of joint tort against them, confessing, in other words, that if the separate negligence and the injury charged were proved they were jointly answerable in damages; and if jointly liable upon proof against each, it follows there was also a several liability resting on that one, if only one, against which the charge was established. The court therefore properly, on this state of the pleadings, allowed the jury to acquit one defendant and bring in a verdict against the other; and hence, of course, there was no error in overruling the motion of the Richmond & Danville Company for judgment in its favor *non obstante veredicto*.

We shall not disturb the trial court's action on the motion to require the plaintiff to submit to a physical examination of his person. Under the circumstances the motion was not seasonably made; and to have granted it would probably have been to have postponed the trial when it might as well have been brought forward sufficiently early for this result to have been avoided. Moreover, it should not have been granted at all, if it would have necessitated the plaintiff's presence in Alabama and it appeared that he was not reasonably equal to the journey from his home in Texas.

There was no error in the refusal of the court to allow separate panels from which to make up the struck jury demanded.—*Montgomery & Eufaula R.R. Co. v. Thompson*, 77 Ala. 448.

In support of the trial court's action in overruling defendant's motion to exclude certain answers of plaintiff's witnesses to interrogatories propounded to them by the plaintiff, it will suffice to say that the answers were responsive to the interrogatories, and no objections to the latter were ever interposed by the defendants.—*Louisville & Nashville R. Co. v. Hall*, 91 Ala. 112, 119.

Moreover, none of the assignments of error addressed to

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the rulings below on the admission of testimony are insisted on in argument; and we will not further discuss those rulings.

There was evidence which afforded ground for an inference of wantonness, or reckless indifference to consequences, in the conduct of the engineer in charge of the Richmond & Danville train. Without stating the testimony in full on this point, it will be sufficient to recall that of passengers on that train to the effect, or tending to show, that it's speed when approaching the crossing was from thirty to forty miles per hour, that it was not only not brought to a full stop near the crossing, as required by the statute, but that to the contrary, its speed was not at all slackened in its approach thereto; and of the engineer and fireman on the Savannah & Western train, that the engines were in plain view of each other, when that of the latter train was about to go on the crossing, and that of the Richmond & Danville was one hundred and fifty feet away. If this testimony was true, and its truth was a question for the jury, the inference is readily, if not obviously, deducible that the Richmond & Danville engineer took the desperate chance either of passing the crossing before the immediately approaching engine on the other road reached it, or, if that engine was already there, the equally desperate chance of its being backed off before his engine reached the crossing. In either event, assuming the Richmond & Danville engineer to have been a sane man, the conclusion that he must have then had in his mind the probable consequences of his wrongful omission to make any effort to stop or to slacken the speed of his train is certain and inevitable. If the jury reached this conclusion, as upon the evidence it was open to them to do, the case involved every element of that wantonness, willfulness or reckless indifference to probable results necessary to the imposition of punitive damages. The court's charge *ex mero motu* on this part of the case, and its refusal to give charges 1 and 3 requested by the Richmond and Danville Company, were free from error.

On the other hand, there was evidence going to show that the engineer did not *know* the Savannah & Western train was upon or approaching the crossing and had not *actual knowledge* of the impending peril of a collision in time to avert it by a resort to all possible preventive effort. And the question raised by the trial court's refusal to give charges 8 and 9 requested for the Richmond & Danville Company is whether, if this evidence be true, its engineer could be guilty of wantonness, or the like. It was settled

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in *Lee's Case* and again in *Webb's Case* that the knowledge of danger upon which, in connection with the absence of subsequent diligence to avoid its consequences, a charge of wantonness might be sustained, need not be that which is presently acquired through the physical senses; the party charged need not on the particular occasion see or hear, or through other sense become advised of the actual presence of every element necessary to constitute the danger that really exists. If, as was in affect declared in those cases, he knows of a crossing where people are wont to be in such numbers and with such frequency, a fact also known to him, as that to run a train along there with such great speed as not to be readily controlled and which might not admit of the escape of persons crossing the track, his conduct, he having in mind that he was approaching such a place, would authorize the imputation of wantonness, willfulness or reckless indifference to consequences, though in point of actual fact he did not in the particular instance know of the presence of persons in exposed positions.—*Ga. Pac. Rwy. Co. v. Lee*, 92 Ala. 262; *L. & N. R. R. Co. v. Webb*, 97 Ala. 308.

Tendencies of the evidence in the case at bar bring it, in our opinion, within the doctrine just stated. The engineer knew the location of the crossing; he knew that he was approaching it, for, according to all the evidence, he sounded the whistle of the locomotive with reference to it; he knew that trains on the other road were liable at any time to be on the crossing and unable to pass clear of it after the two trains were in view of each other, or might at any time be approaching the crossing without the ability to stop short of it after seeing a train rapidly approaching it on his road, and that such other trains had the same right as his to approach and be on the crossing. He was advised by the statutory rule, of which he was presently aware, of the exceeding great danger of rushing headlong onto the crossing in violation of it, and a visible sign was there to admonish him of the point beyond which in every instance it was unsafe for him to go without stopping and ascertaining the way to be clear; and he knew also of that physical conformation of the locality which obscured one road from the other and trains on them from each other, until they were so near together in approaching the crossing as that, unless the statute had been complied with, trains going even at an ordinary rate of speed would inevitably collide. The jury finding the truth of these tendencies of the evidence, and further finding, as it was open to them to do, that this engineer, with all of this

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in his mind, hurled his train at a great speed upon the crossing, not even slackening its pace of thirty or forty miles an hour, were authorized to conclude that he had that consciousness of the perilous character of the situation and of his own conduct with reference thereto, which is an essential element of wantonness and the like, though they might also have believed that he had no *actual knowledge* of the approach of the Savannah & Western train. Charges 8 and 9 were therefore misleading, and well refused.

The plaintiff being a passenger on the colliding train of the Richmond & Danville Company, its employes, and among the rest the engineer, owed him the duty of exercising the highest degree of care, diligence and skill, in conservation of his safety, and the company was responsible in damages to him for the slightest negligence on the part of its servants resulting in injury to him.—*M. & E. Rwy. Co. v. Mallette*, 92 Ala. 209; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514. Care and diligence such as a reasonable and ordinarily prudent person would exercise is in legal contemplation reasonable and ordinary care and diligence: it is not that highest, that utmost degree of care and diligence and skill which the law exacts of the carriers of passengers. Nor is conduct actuated by good faith and an honest purpose to avoid injury to passengers the equivalent of the highest care, or even necessarily of ordinary care. It is not what a man sincerely intends doing and does with sincere purpose to a given end that determines whether in doing it he has exercised the care demanded by the situation, but the inquiry is to be resolved upon a further consideration of his acts themselves. A negligent act is none the less negligently performed because of the good faith which characterizes it. It may be that trainmen on stopping for a crossing are not required to *know* with absolute certainty in any case that the way is clear before proceeding; but, at least when the lives of passengers are at stake, they must actually make every effort, that the highest degree of care, skill and diligence requires, to be sure that the way is clear and will remain so sufficiently long for the safe passage of a bisecting road. That they may have done all *they thought* necessary for assurance will not suffice: they must have done all that the dictates of the utmost care would have suggested to be done. Charges 5 and 6 requested for the Richmond & Danville Company are faulty when brought to the touch of these considerations. They were, moreover, especially misleading in view of a tendency of the evidence to show that a train at the

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“stop-post” of the Savannah & Western road could not be seen by the engineer from his position at the “stop-post” of the Richmond & Danville road. There was no error committed in refusing them.

That trainmen of one road who, have complied with the statute on approaching a crossing, have a right to assume that trainmen on the other road will also comply with it, in the absence of any indication that they can not or will not, has been expressly decided by this court in a recent case. The general charge of the court on this subject is not open to the objection presented by the exception thereto, that it ignores a duty which might have arisen upon circumstances transpiring after the train has started after complying with the statute. That matter is accommodated in the further declaration, not included in the language marked by the exception, but a part of the charge on the same point, and to be considered along with every other part, to the effect, by necessary implication, that the first train has not the right to proceed over the crossing if the circumstances indicate that the other train will not stop.—*Birmingham Mineral R. R. Co. v. Jacobs*, 92 Ala. 187.

Charge No. 11 given at the request of the Savannah & Western Company assumes that the Richmond & Danville Company was guilty of negligence, and submits to the jury the inquiry only as to whether its negligence was the proximate cause of the injury. The question of negligence *vel non* on the part of the Richmond & Danville Company was severely litigated before the jury on parol testimony. It was solely the jury's province to determine that question. The charge under consideration was invasive of the jury's exclusive prerogative to find either that that company was or was not guilty of the negligence charged. The giving of it was erroneous.—*Cary v. State*, 76 Ala. 78; *Sandlin v. Anderson, Green & Co.*, 76 Ala. 403; *Joyner v. State*, 78 Ala. 448; *Carter v. Chambers*, 79 Ala. 223; *Jones v. Field*, 83 Ala. 445.

The judgment of the City Court is reversed, and the cause will be remanded.

[Baldridge et al. v. Eason.]

Baldridge et al. v. Eason.*Bill in Equity to Enjoin the Levy of an Execution.*

1. *Judgment against a partnership.*—In a suit where the defendant is described in the caption of the complaint as B., M. & H. “a firm composed of” certain individuals, and there is nothing in the body of the complaint to show that the members of the firm are sued, and the summons to the defendant follows the caption of the complaint, a judgment rendered therein is against the partnership as a firm, as provided by section 2805 of the Code, and is not joint and several in its legal effect, as provided in section 2804 of the Code.

2. *Same; execution thereon.*—An execution issued upon a judgment recovered against a firm only, as provided in section 2805 of the Code, can be levied only on the property of the firm. -

3. *Injunction to prevent levy upon individual property of an execution issued upon a judgment against a partnership.*—A bill filed to enjoin a sheriff from the threatened levy upon the individual property of the members of a partnership of an execution issued upon a judgment recovered against the firm only, is without equity; a court of law being invested, with full authority to prevent an abuse of its process, and being able to give ample redress.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed by the appellants, William F. Baldridge and Chas. H. Halsey, against the appellee, John Thomas Eason; and sought to have the sheriff enjoined from the levy of an execution issued on a judgment recovered by said Eason against the firm of Baldridge, Murray & Halsey.

The bill alleges that the respondent, John Thomas Eason, sued the partnership of Baldridge, Murray & Halsey in the Circuit Court of Madison county, and recovered in said suit a judgment by default against the said firm, and that the sheriff, under the levy of an execution issued on said judgment, was about to levy said execution upon the goods, chattels and property of the complainants individually. The caption of the complaint, the summons to the defendant, the judgment rendered, and the execution thereon are sufficiently stated in the opinion. The bill further alleged that the complainants had no notice of the suit, never having been served with a summons and complaint, and that they had a complete legal defense to the same, which alleged defense was set out at length in the bill. The respondent de-

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murred to the bill, and moved to dismiss the same for the want of equity, and also moved to dissolve the temporary injunction. The chancellor sustained the demurrer, and granted each of the said motions. The complainants appeal, and assign as error this decree of the chancellor.

WILLIAM RICHARDSON, for appellants, cited Daniels Ch. Prac. (3d Ed.) pp. 1845-7; Hicks Ch. Prac. (Tenn.) p. 331; *Ridgeway v. The Bank*, 11 Humph. 523; *Bell v. Williams*, 1 Head, 60 and 230; 2 Sneed, 435; 4 Heisk. 671; 7 Heisk. 419; 10 Heisk. 611; 1 Coopers Ch. 135; 3 Coopers Ch. 51; 1 Thomps. Cases, 135; 86 Tenn. 228; High on Injunctions, Vol. I, p. 163; *Windsor v. McVeigh*, 93 U. S. 274; 10 Am. & Eng. Encyc. of Law, p. 884, § 29; *Johnson v. Christian*, 128 U. S. 374; Bispham's Principles of Equity, §§ 407-414.

D. D. SHELBY and S. S. PLEASANTS, *contra*, cited *Haralson v. Campbell*, 63 Ala. 278; *Beadle v. Graham*, 66 Ala. 102; 1 High on Injunctions, § 175, and cases there referred to.

COLEMAN, J.—One of the main questions presented by the record, is whether the judgment recovered by appellee Eason in the Circuit Court against the firm of Baldridge, Murray & Halsey was joint and several in its legal effect as provided in section 2604 of the Code, or a judgment against the firm only as provided in section 2605 of the Code.

We are of the opinion that the pleading and the judgment entry show that the judgment was rendered against the partnership as such only. In the caption of the complaint, the parties are stated as follows:

John Thomas Eason, Plaintiff,

vs.

Baldridge, Murray & Halsey, a firm
composed of W. F. Baldridge, Charles
H. Halsey and A. F. Murray, defendants.

There is nothing in the body of the complaint to show that the members of the firm are sued. The summons is as follows: "You are hereby commanded to summons Baldridge, Murray & Halsey, a firm composed of," &c.

Under our statutes, a suit against William F. Baldridge, A. F. Murray, and Charles H. Halsey, constituting the firm of, or doing business as partners under the name of Baldridge, Murray & Halsey, is very different from a suit against Baldridge, Murray & Halsey, a partnership composed of, &c. The character of the summons to be issued and the effect of service of summons is quite different. A service of the

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the purpose of showing they have a meritorious defense to the action at law. The bill prays for an injunction. It admits service of copy of summons and complaint upon Murray, the other member of the firm of Baldridge, Murray & Halsey, and the return of the sheriff shows this to be true. The fraud or undue advantage is alleged in the recovery of the judgment at law. Service on one member of the firm was sufficient to authorize the rendition of the judgment.—Code, § 2605, and authorities *supra*. The ground of relief, as stated in the bill, is that plaintiffs were not served with notice. This was unnecessary. The bill is filed under a misapprehension of the character of the judgment rendered in the Circuit Court. Under this judgment, and under the execution in the hands of the sheriff, no levy can be made on other than the property of the firm. The simple fact that the sheriff threatened, or is about to commit a trespass on their property, is not cause for equitable interference. The Circuit Court is invested with full authority to prevent an abuse of its process.—Code, § 2864. Under the facts of the case, the courts of law afford ample redress. There is no equity in the bill, and the court did not err in so holding.

Affirmed.

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Attachment against Non-resident.

1. *Proof of notice; recitals thereof in judgment-entry.*—To sustain a judgment by default against a non-resident, who was not personally served with notice, the suit being commenced by attachment, the record must show that proof was made to the court of all the facts necessary to constitute constructive notice by publication (Code of 1886, § 2936); and the mere recital in the judgment-entry that notice was given as required by law, not stating the facts, is not sufficient to sustain the judgment on appeal.

2. *Personal judgment by default against non-resident.*—A personal judgment by default can be rendered against a non-resident in attachment, upon proof of statutory notice.

APPEAL from the Circuit Court of Geneva.

Tried before the Hon. J. M. CARMICHAEL.

This was an action brought by the appellee, W. J. Keith against V. & A. Meyer & Co., who resided in the State of Louisiana. The complaint contained the common counts. The suit was commenced by an attachment, which was regu-

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larly issued upon affidavit made and bond given. This attachment was executed by serving a garnishment on Holloway & Gilchrist and C. R. Keith. The transcript contains no bill of exceptions. The judgment entry was as follows: "January 16, 1892. Came the garnishee, C. R. Keith, and answers orally to the indebtedness in twenty three hundred and fifty dollars, due to the defendants, by promissory notes due in January and March, 1891. And came the garnishee, Holloway & Gilchrist, who file there their answer in writing, admitting indebtedness in the sum of eleven hundred and twenty-six and 70-100 dollars, due by note the 1st of January, 1891, and suggest that the Mutual National Bank of New Orleans claims the debt. It is agreed [?] by the court that notice issue to said Mutual National Bank of New Orleans to come in and propound its claims to said debt; and proof being made known to the court of the publication of notice of the non-residence of the defendants in the Geneva Record, a newspaper published in said county, for the term required by law; and the defendants being called came not, but made default. It is thereupon ordered by the court that judgment be rendered against the defendants with a writ of inquiry. . . . It is thereupon considered adjudged by the court that the plaintiff have and recover of the defendants the said sum of," &c.

The present appeal is prosecuted by the defendants, who assign as error the said judgment rendered against them.

TOMPKINS & TROY, for appellants.—The recital in the judgment-entry, that the publication was according to law, is not sufficient to sustain the judgment on appeal.—Code of 1886, § 2936; *Dow v. Whitman*, 36 Ala. 604; *Brierfield v. Austin*, 39 Ala. 227; *Diston & Sons v. Hood*, 83 Ala. 331. The court erred in rendering a personal judgment against the defendants.—*Vanfleet's Collateral Attack*, § 394, and authorities there cited; *Penoyer v. Neff*, 95 U. S. 714.

W. D. ROBERTS, *contra*.

HEAD, J.—The recitals of the judgment-entry do not sufficiently show that the notice required by the statute of the issuance and levy of the attachment was given. A recital, as in the present case, that notice was given as required by law, will not sustain a judgment by default.—Code, § 2936; *Dow v. Whitman*, 36 Ala. 604; *Brierfield v. Austin*, 39 Ala. 227; *Diston & Sons v. Hood*, 83 Ala. 331.

The complaint, so far as the transcript shows, was not VOL. XCIX.

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marked filed by the clerk. That should be attended to. We do not decide that a complaint found in the transcript and certified to by the clerk, in his general certificate, as a part of the record of the proceedings, will not be regarded by us as a part of the record, because not so marked. We simply call attention to the irregularity, which appellants insist upon now as a ground of reversal, that it may be cured.

It is insisted by appellants that no personal judgment by default can be rendered against a non-resident in attachment on statutory notice; but that the judgment should be one of condemnation only. The question has been settled contrary to this contention by the decisions of this court, from which we are not inclined to depart.

Reversed and remanded.

Aderhold v. Mayor and City Council of Anniston.

Prosecution for Violation of City Ordinance.

1. *Appeal from Recorder's Court; motion to quash proceedings.*—When a person, who has been arrested, without affidavit or warrant, for the violation of a city ordinance, appears before the Recorder, and without objection pleads not guilty, and is tried and fined, he is presumed to have waived the want of an affidavit or warrant of arrest; and on appeal to the City Court a motion to quash the proceedings in that court, on the ground that the prosecution was commenced without affidavit or warrant, comes too late, and is properly overruled.

2. *Variance between complaint and summons.*—When, in a prosecution for the violation of a city ordinance, the summons to the defendant commanded him to appear before the Recorder and answer the charge of "disorderly conduct and fighting," and the complaint filed in the City Court, on appeal, averred that the defendant "participated in a fight," the variance is immaterial, and a demurrer to the complaint on the ground of such variance is properly overruled.

3. *Filing of complaint.*—A complaint may be filed in the City Court on appeal any time before the trial.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

The appellant was tried and convicted before the Recorder of the city of Anniston for a violation of ordinance 317, which ordinance was in the following language: "*Affrays.*—Any person who engages or participates in any fight or

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affray, must, on conviction, be fined not less than one nor more than one hundred dollars." An appeal was taken from the judgment of the Recorder to the City Court. Upon the filing of the complaint in the City Court, the defendant demurred thereto, on the ground that there was a variance in the complaint as filed and the summons as originally issued. This demurrer was overruled, and the defendant duly excepted.

Upon the trial of the case in the City Court of Anniston, the plaintiff introduced in evidence ordinance No. 317 as above copied, and ordinance No. 102, which was in the following language: "Recorder, judge of law and facts.—In trials before the recorder for violation of city ordinances, the recorder shall determine both the law and facts, and justice shall be speedily administered by him. No statement of the offence need be made other than that contained in the summons, or affidavit and warrant of arrest, and if the defendant has been arrested without warrant, the entry on the recorder's docket of the offense charged shall be treated as such statement."

All the other facts necessary to an understanding of the questions decided by the court are sufficiently stated in the opinion. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, the court rendered judgment in favor of the plaintiff. The defendant brings the present appeal, and assigns as error the rulings of the court upon the pleadings, and the judgment rendered in behalf of the plaintiff.

MCLEOD & TUNSTALL, for appellant.—1. A prosecution must be commenced either by affidavit and warrant, or by indictment of the grand jury, and it cannot be commenced by summons.—4 Amer. & Eng. Encyc. of Law, 730; 1 Bishop Crim. Procedure, (3d Edition), § 30. 2. Two offences of different character and of different mode of trial and punishment, can not be joined together in the same indictment or summons.—*Adams v. State*, 55 Ala. 143; *Little v. State*, 89 Ala. 99. 3. The offence alleged in summons, and the one upon which defendant was tried, must be the same. If there is a variance in this, it will prove fatal to the prosecution.

JOHN PELHAM, *contra*.—The motion to quash came too late.—*Noles v. Marable*, 50 Ala. 366; *Beck v. Glenn*, 69 Ala. 121; *Perry v. Hurt*, 54 Ala. 285.

[Aderhold v. Mayor and City Council of Anniston.]

HARALSON, J.—The charter of city of Anniston as amended, (Acts 1890-91, p. 109, § 3) provides, that in cases of appeal from the recorder, "The proceedings on such appeal shall be in all respects as prescribed by law in cases of appeals from judgments of a justice of the peace in civil cases, except as changed by this section. . . . In case the defendant appears, and judgment is rendered by said court for money, the court must also render judgment against the sureties on his appeal bond, for the amount of such judgment and costs."

Two ordinances of said city, Nos. 102 and 317, were introduced, and are set out in the record.

The defendant was arrested, so far as is shown, without affidavit or warrant. He appeared before the recorder, at his office, at the time to which he was summoned, "to answer to the charge of disorderly conduct." He pleaded not guilty, was regularly tried on that issue, on evidence introduced on both sides, and was fined and sentenced by the Recorder. He appealed to the City Court of Anniston, in the manner prescribed by the charter, where, as we have seen, the case is required to be tried as appeals in civil cases from justices of the peace are tried.

Coming to the City Court, the plaintiff filed a complaint as in civil cases, claiming the amount of the judgment and costs imposed on defendant by the recorder, for violation of said ordinance, No. 317, of said city, averring that the defendant, within twelve months before the 11th of November, 1891, participated in a fight, in violation of said ordinance, for which he was duly tried, convicted, and fined by the recorder.

The defendant moved to quash the proceedings in the City Court, on the grounds, that the prosecution was commenced without affidavit and warrant, and because two distinct offenses are charged in one. He also moved to strike the complaint from the file, because not filed in thirty days, and demurred to it.

The motion to quash was properly overruled. Not having raised these objections in the Recorder's court, but having there voluntarily appeared to answer the charge, and having pleaded and gone to trial, the defendant waived them, if they existed, and could not raise them for the first time in the City Court, on a motion to quash.—*Blankenshire v. State*, 70 Ala. 10; *Staggers v. Washington*, 56 Ala. 225; *Noles v. Marable*, 50 Ala. 366; *Miles v. State*, 94 Ala. 106; 11 So. Rep. 403. The statute requires such case to be "tried *de novo*, and according to equity and justice, without re-

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gard to any defect in the summons or other process or proceedings before the justice."—Code, § 3405; Ordinance 102 of City of Anniston.

It was proper to allow the complaint to be filed, at any time before the trial. It charged the defendant with participating in a fight, or affray, and the summons was, to answer for disorderly conduct and fighting. This slight variance was immaterial. Even where imperfections of a graver character exist in the complaint, before the justice, it is competent, where there has been an offence charged, to cure them in the complaint in the appellate court. *Williams v. The State*, 88 Ala. 82; *Blankenshire v. The State*, *supra*. There was no error in refusing to strike out the complaint, and in overruling the demurrer to it.

The evidence in the case made out a clear case of guilt against the defendant.

Affirmed.

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O'Keif, Admr. v. Memphis & Charleston R. R. Co.

Action to recover Damages for the Death of Employee of a Railroad Company.

1. *Action by administrator of deceased employee must be brought within one year after the cause of action accrues.*—An action against a railroad company by the administrator of a deceased employee, to recover damages for the alleged negligent killing of his intestate, must be commenced within one year after the cause of action accrued, as provided by subdiv. 8, section 2619 of the Code of 1886; and is not governed by section 2589.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

This action was brought by the appellant, Dennis O'Keif, as administrator of John O'Keif, deceased, under the Employers' Liability Act, to recover damages for the killing of plaintiff's intestate, while in the employ of defendant, which was alleged to have been caused by the negligence of those under whose orders and control his intestate was acting; and who, as his superiors in authority, had charge of the train, and to whose orders the deceased was bound to conform. The death of the plaintiff's intestate occurred on De-

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ember 25, 1886, plaintiff was appointed administrator of his estate January 21, 1887, and this action was begun on November 19, 1888—one year, 10 months and 24 days after the date of his killing.

Among other pleas the defendant pleaded the statute of limitations of one year, under subdivision 6 of section 2619 of the Code. Demurrers to this plea, raising the question of the application of the statute of limitations of one year to a case like the present, to recover from the employer damages for the death of an employee, were interposed by plaintiff, and were overruled by the court. The court, at the request of the defendant, gave the general affirmative charge in its behalf, to the giving of which charge the plaintiff duly excepted.

The plaintiff requested charges presenting his contention, that the statute of limitations of one year did not apply to a case like the present one; the court refused to give such charges, and plaintiff separately excepted. The single question presented is whether the statute of one year under subdivision 6 of section 2619 of the Code controls this case, or whether it is governed by section 2589 of the Code of 1886.

There was judgment for the defendant, and plaintiff appeals.

ROULHAC & NATHAN and J. B. MOORE, for appellant.—The limitation of an action founded on a statute must be imposed by the statute creating the right; and when not so imposed it is governed by the common law.—*Rhodes v. Turner*, 21 Ala. 217; *McArthur v. Carrie's Admr.* 32 Ala. 88; *Austin v. Jordan*, 35 Ala. 643; *Harrison v. Harrison*, 39 Ala. 499. The original act under which this suit is brought does not contain any limitation as to the time an action must be commenced.—Acts 1884-5, p. 115, Code, § 2591. The general statute of limitations governing suits for personal injuries is not broad enough to embrace a suit by the personal representative for the killing of his intestate.—Code, § 2619, subdiv. 6. The actions governed by this subdivision of section 2619 are for injuries to the person; and it is not applicable to actions brought to recover damages for negligence resulting in death. An action by the representative is not for injuries to the person only, but for the result of those injuries; and is not governed by the statute of limitations of one year.—*James v. R. & D. R. R. Co.*, 92 Ala. 235; *McAdory v. L. & N. R. R. Co.*, 94 Ala. 272; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548.

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HUMES, SHEFFEY & SPEAKE, contra.—When a statute creating a right is silent as to the limitation of an action, the general statute of limitations applies.—2 Rorer on Railroads, pp. 1447, 1448. A claim of damages against a railroad company on account of injuries is governed by the general statute of limitations.—*M. & M. R. R. Co. v. Crenshaw*, 65 Ala. 567; *Nicholson v. M. & M. R. R. Co.*, 49 Ala. 205; *Huss v. C. R. R. & B. Co.*, 66 Ala. 472; *Hughes v. Anderson*, 68 Ala. 280. This is an action for personal injuries; the statute creating the action denominates the action as being for “personal injuries.”—Code of 1886, §§ 2590, 2591. It is, therefore, governed by section 2619 of the Code, subdiv. 6. The foundation of an action like the present is the injury which caused the death, and not merely the effect of death itself.—1 Shearman & Redfield on Evidence (4th Ed.), § 140; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548. An action for wrongfully causing death by negligence is an action for personal injuries.—*Titman v. New York*, 57 Hun 469; 10 N. Y. Sup. Rep. 689; 32 N. Y. Sup. Rep. 106; 42 Albany Law Journal, 328.

STONE, C. J.—The majority of the court holds that the limitation of one year bars this action, and that, for that reason, the Circuit Court did not err in giving to the jury the general charge, to find for the defendant, if they believed the evidence. The question is, whether section 2589, or section 2619, subdiv. 6, controls this action.

Affirmed.

Trufant et al. v. White & Co.

Statutory Action of Ejectment.

1. *Adverse possession.*—Possession of land from 1851 to 1888, the holder exercising acts of ownership incident to adverse holding, can not be declared, as matter of law, to have been adverse possession, if such holder, in 1888, made admissions tending to show that his possession had been in recognition of a paramount title, and permissive under it; the character of such possession being a question determinable only by a jury.

2. *Same; permissive possession under admitted paramount title for ten years.*—If, after adverse possession has ripened into a title, the holder thereof admits that his possession is in recognition of a paramount title, and after such admission he continues in possession permissively under this confessed paramount title for ten years, the title

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to said land thereby becomes divested out of him, and revested in the admitted owner.

3. *Adverse possession after admitted permissive possession.*—If one, who has been in possession of real estate for many years, admits that such holding was in recognition of, and permissive under, a paramount title in another, his possession subsequent to such admission can not become adverse, without an open and distinct disavowal of the title of the admitted owner, and the assertion of a hostile title, involving a repudiation of the subordinate character of his former possession, brought to the actual knowledge of the true owner.

4. *Evidence; payment of taxes.*—In determining whether the possession of certain lands by one, who admits a former permissive holding, has become adverse, evidence showing payment of taxes on said lands by said holder, and that he scheduled the said lands in a bankruptcy proceedings by him, is competent as tending to show the character of his subsequent possession.

5. *Argumentative charges.*—While argumentative charges should not be given by a court, the giving of them is not a reversible error.

APPEAL from the District Court of Lauderdale.

Tried before the Hon. W. P. CHITWOOD.

This was a statutory action of ejectment brought by the appellants against the appellees; and sought to recover lot No. 215 in the town of Florence, Alabama.

The plaintiffs sue as heirs of J. J. Hanna, deceased, and the defendants constitute the firm of J. B. White & Co. The plaintiffs rest their claim to the property sued for upon the following chain of title, which was shown by the bill of exceptions:

In the year 1824 there was granted unto L. Pope and several, others as trustees of the Cypress Land Co., a patent from the United States Government for the fractional section 14 in Township 3, of Range 11, West, a part of which was lot 215 now sued for. Upon the organization of the Cypress Land Company these trustees transferred to said Company, together with other property, the patent to fractional section 14. By the articles of association it was provided that the property should be divided into lots, streets, alleys &c, and that agents and attorneys should be appointed to sell and convey by deeds to the purchasers of said lots from the Cypress Land Company. Purporting to act under a power of attorney granted by the association, James Irvine and Peter Anderson sold and transferred unto Sarah Hanna and Thomas Childress lots 214 and 215, as laid down in the map of the town of Florence. Thomas Childress and Sarah Hanna conveyed the lots 214 and 215 to James J. Hanna by deed duly executed and dated December 12, 1833. Said James J. Hanna remained in possession of the

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same up to the time of his death, which occurred in Jan. 1867. The plaintiffs are his heirs, and now claim in that capacity.

The plaintiffs introduced evidence tending to show that Thos. Childress had had possession of the lots sued for during his life time until he conveyed the same to J. J. Hanna. The plaintiffs also introduced in evidence the deposition of Mrs. Mary Hanna, who was the wife of Alex J. Hanna, son of James J. Hanna. In her deposition Mrs. Mary Hanna testified as to certain letters which she had found amongst her husband's papers. These letters were addressed to Alex J. Hanna, and were written by John W. McAlester, from whom the defendants derive their title. These letters were attached as exhibits to Mrs. Hanna's deposition, and showed that John W. McAlester had control of said lands as the agent of J. J. Hanna, and recognized the right and title of his heirs to the same. In one of his letters, dated April 3, 1863, John W. McAlester stated, "I have two lots under fence which your father, when last here, informed me, belonged to him. I think he told me they belonged originally to his mother. They are like most other lots in the place—of but little value. I am willing to give for them what they are worth." In response to a letter written by A. J. Hanna in answer to the above letter of J. W. McAlester, in May, 1868, McAlester again referred to the said lands as belonging to A. J. Hanna's father, and said that, not having found them among the deeds of his father, he would examine the records for the same. On July 17, 1868, A. J. Hanna received another letter from McAlester in which he again acknowledged J. J. Hanna's title to the property. Plaintiffs introduced evidence tending to show that during his life time John W. McAlester had never renounced to any of them or disclaimed their title to said land, or had ever given them any notice of any adverse claim of possession on his part to said lot. It was also further shown that neither of the plaintiffs knew any thing about the lands in controversy until the letters of McAlester were found among A. J. Hanna's papers just before the suit, and that suit was brought immediately on finding the letters. The record shows that the present suit was instituted on May 3, 1888.

The defendants, as is stated above, traced their title from John W. McAlester, and they introduced in evidence a deed from John W. McAlester to Kate W. McFarland, dated March 1, 1879, in which McAlester conveyed, among several other lots, the one here sued for. The defendants then offered in evidence a deed from Mrs. Kate McFarland and

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her husband to them, conveying the land here sued for. This deed was dated Feb. 15, 1887. The defendants offered in evidence a petition of McAlester and Irvine, a firm composed of John W. McAlester and James B. Irvine as partners, and of the individual members of said firm, praying to be adjudged voluntary bankrupts. In a schedule attached to this petition in which petitioners claim property exempt to them, there was lot No. 215, the lot in controversy, scheduled as the property of J. W. McAlester. This petition and schedule were filed in March, 1877. In neither said petition nor in said amended schedules was the name of any of the parties to this suit mentioned, reported as a creditor or referred to in any manner. The plaintiffs objected to the introduction of said petition and schedules in evidence upon the grounds, "that none of the plaintiffs being parties to said proceedings in any manner, they could not be bound by said proceedings, or any matter or thing connected with or growing out of the same; that it being shown by the testimony that said McAlester had acknowledged the title of plaintiffs, and those through whom they claimed, and admitted that he held said lot in subordination to said title, his possession of said lot could not become adverse to plaintiffs without notice brought home to them, that he renounced and repudiated their title, and that said bankrupt proceedings offered in evidence constituted no notice of such renunciation by him; and that such evidence so offered was irrelevant to any issue in this cause." The court overruled these objections, allowed the same to be introduced in evidence, and the plaintiffs duly excepted.

The defendants then offered in evidence, against the similar objections and exceptions of plaintiffs, a certified transcript from the District Court of the United States for the Northern District of Alabama which showed that McAlester and Irvine, as a firm and as individuals, were adjudged voluntary bankrupts, and that there was allowed McAlester, among other exempt property lot No. 215. The defendants then offered in evidence the State and County tax books of Lauderdale county from the years of 1869 to 1879 showing that, with the exception of the years 1875, 1876 and 1877, when said lots were not assessed to him or any one else, John W. McAlester had given in for taxes in his own name several lots in the town of Florence, among which was lot No. 215. The plaintiffs objected to the introduction of said tax books in evidence upon the grounds, "that the same were irrelevant to any issue in this cause and illegal; and that it being shown by the evidence that said John W. McAlester

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had recognized and acknowledged the title of the plaintiffs and those through whom they claim said lot, and admitted that he held said lot in subordination to their said title, his possession of said lot could not become adverse to plaintiffs without notice brought home to them, that he renounced and repudiated their said title, and that such assessment of taxes by him constituted no notice of such adverse holding or of said renunciation by him; and that it was incompetent to show by said assessments of lots to said McAlester, in his own name or by the assessments of other lots to him, in his own name as trustee or agent, that he held or claimed to hold the lots in this suit adversely or in hostility to the title of plaintiffs." The court overruled said objection, admitted said evidence "alone to show the character of John W. McAlester's possession, and for no other purpose and so instructed the jury." The plaintiffs thereupon duly excepted to his ruling of the court. The defendant introduced, against the similar objection and exception of the plaintiffs, the testimony of the tax collector of Florence, to the effect that the municipal tax books of the city of Florence for the years of 1861 to 1881 were lost, but that with the exception of the years 1875, 1876 and 1877, when said lots were not assessed to him, John W. McAlester had given in for taxes in his own name several lots in the town of Florence, among which was lot No. 215 here sued for. The defendants introduced several witnesses whose testimony tended to show that John W. McAlester had had possession of the lot involved in this suit from as far back as 1851 up to the time he sold it to Mrs. Kate McFarland, and that he had cultivated it, raising vegetables thereon, and had used it as his garden; that it was inclosed from 1861 to 1869; that he had offered to sell it to some of the witnesses; that he spoke of the lot as his and acted with respect to it as he did to lots which he owned. These witnesses further testified that he claimed this lot as his, but did not state how he claimed or held it; that his possession, after the month of July, 1868, was just the same in character as it had been previous to that time. The plaintiffs moved to exclude the testimony of these witnesses in relation to the possession of said lot by McAlester, and the fact that he claimed the same as his own, upon the same grounds assigned to former motions; and duly excepted to the court overruling their motion.

At the request of the defendant, the court gave the following charges, to the giving of each of which the plaintiffs separately excepted: (2.) "If the jury believe from the evidence that any time before the commencement of this

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suit, John W. McAlester was in open, notorious, and continuous possession of the lot in controversy for ten years, claiming the same as his own, and that his possession was transferred to Kate W. McFarland, and her possession was transferred to defendants, then the defendants have established the defense of adverse possession of ten years, and are entitled to a verdict." (3.) "If the jury believe from the evidence that the possession of John W. McAlester was transferred to Kate W. McFarland, and that her possession was transferred to defendants, then the said successive possessions may be counted together in computing the time, and if the jury find from the evidence, that at any time, said successive possessions together were open, notorious, adverse and continuous for ten years, claiming the lot as their own, then the defendants are entitled to a verdict." (4.) "To constitute adverse possession it is not necessary that the party to be affected thereby should have actual notice of the same." (5.) "A non-resident is affected by the adverse possession of his land in this State to the same extent as a resident, and the same facts which would carry home to a resident notice of such adverse possession, would carry such notice home to a non-resident." (6.) "The statute of limitations is a statute of repose, and should be upheld and enforced by the courts and juries with a steady hand." (7.) "Statutes of limitations are enacted in the interest of repose; their remedial provisions are never construed narrowly; they rest on the presumption that meritorious [claims (?)] are not allowed to slumber until human testimony is lost or human memory fails. I charge you, therefore, that they should be upheld with a steady hand." (11.) "If the jury believe from the evidence that John W. McAlester was in the open, notorious and continuous adverse possession of the land sued for more than ten years after the letter of July 7, 1868, was received by Alex. J. Hanna, and before the bringing of this suit, claiming said land as his own, then I charge you, that the plaintiffs' right of action is barred, and your verdict must be for the defendant." (12.) "If the jury believe from the evidence that McAlester held open, notorious and continuous adverse possession of the lot in controversy, claiming the same as his own from 1852 till 1868, then the title of defendants had become perfect by the continuance of the adverse possession." (15.) "If the jury find from the evidence that the letters of John W. McAlester to Alex Hanna, referred to 'two lots on the opposite corner towards the river,' and that the lot in controversy (lot 215) was not

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on the opposite corner towards the river, but was on Court street, beyond Limestone street, and that lots 214 and 216 were nearer to McAlester's residence than it, they have a right to take these facts into consideration in determining which lots McAlester referred to."

There was judgment for the defendant, and the plaintiffs bring this appeal, and assign as error the various rulings of the lower court, to which exceptions were reserved.

EMMETT O'NEAL and ROULHAC & NATHAN, for appellants.—If the possession of McAlester, the grantor of defendant's vendor, was permissive, his possession could not become adverse until said McAlester asserted a hostile ownership in himself and repudiated the paramount title of the plaintiffs' ancestor, and a notice of such renunciation was brought home to them, or their ancestor.—*Lucas v. Daniel*, 34 Ala. 192; *State v. Conner*, 69 Ala. 216; *Burrus v. Meadors*, 90 Ala. 144; *Duncan v. Williams*, 89 Ala. 351; *Woodstock I. Co. v. Roberts*, 87 Ala. 440; *Walker v. Crawford*, 70 Ala. 567; *Wells v. Sheerer*, 78 Ala. 142. The possession of McAlester was permissive, as was shown by the admission in letters written by him to plaintiffs' ancestor; and these writings are to be construed by the court.—*Dows v. Nat. Bank*, 91 U. S. 618; 1 Thompson on Trials, §§ 1065, 1067; *Holman v. Crane*, 16 Ala. 570, 580; *Neilson v. Harford*, 8 Mees. & Wels. 823; *Long v. Rodgers*, 19 Ala. 321; *Brown v. Hatton*, 9 Ired. 319; *Smith v. Faulkner*, 12 Gray 251; *Kidd v. Cromwell*, 17 Ala. 648; 1 Greenl. on Ev., § 288 b. The fact that McAlester, after admitting that he held title in subordination to the plaintiffs, paid the taxes on the lands in controversy, and included them in a schedule in a bankruptcy proceeding, can have no effect in the establishment of adverse possession by McAlester, and evidence of this fact should have been excluded.—*Miller v. The State*, 38 Ala. 600; *Taylor v. Dugger*, 66 Ala. 444; *The State v. Conner*, 69 Ala. 216.

SIMPSON & JONES, *contra*.

McCLELLAN, J.—The only defense made to this action is that of adverse possession; it is not controverted that plaintiffs have a perfect chain of muniments of title to the land. The possession of the defendants and of their immediate vendor, Mrs. McFarland, was for a less period than ten years before suit brought. Hence the defense can not be made out without tacking Mrs. McFarland's possession on to that of McAlester, from whom she purchased, which,

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of course, must have been adverse to the plaintiffs, and continued, impressed with that character, to the sale to and putting in possession of said vendee, or without proof that before such sale McAlester's adverse possession had been continued for the statutory period and thus ripened into a perfect title in him. So, there were really but two questions in the case, the resolution of either one of which in defendants' favor entitled them to a verdict and judgment. Namely: *First*. Was McAlester's possession at the time of the sale to Mrs. McFarland, adverse to the plaintiffs, and had it at that date been adverse for a length of time which, added to the possession of Mrs. McFarland and defendants, make out the statutory period, the adverse character of the possession subsequent to McAlester's being confessed? And, *second*, If McAlester's possession was not at that time adverse, had he for any prior period of ten years had such adverse possession as vested him with the legal title, which, in the absence of a conveyance by him or a subsequent holding by him as tenant or agent for the plaintiffs, or in subserviency to them, for the statutory period, remained and was in him when he sold and conveyed to Mrs. McFarland?

The evidence for the defendants tended to show that McAlester went into possession of the land in 1851, and from that time till his sale of it to Mrs. McFarland, he continued in the possession, exercising acts of ownership over it, treating and using it as if it belonged to him and claiming to own it. On the other hand, certain letters written by him in April, May and July, 1868, to the executors of plaintiffs' ancestor were, together with a letter in reply to one of them, written by one of the executors in May, 1868, introduced by the plaintiffs, and tended to show that at that time, that is at least from April 3d to July 17th, 1868, McAlester recognized the title of plaintiffs as paramount and held permissively under it. We say these letters *tended* to show the subserviency of McAlester's possession, because whether they did show it or not was a question for the jury. They amount merely to written admissions of fact for the consideration of the triers of the facts: they are not such writings as the trial court should have interpreted and declared the effect of as matter of law. These admissions were for the consideration of the jury, in two respects. On the one hand, they went to show that McAlester's possession from 1851 to 1868, though having all the visible *indicia* incident to ownership, was not in truth held under a claim of right in himself, and hence was not adverse to the title

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of the plaintiffs. Viewed in this connection, it was open to the jury to find either that McAlester's possession had not, up to that time, been of a character to vest the legal title in him, or that it had been adverse and, therefore, that he had a perfect title when the letters were written. If they reached the latter conclusion, that title continued in McAlester and passed by his conveyance through Mrs. McFarland into the defendants, unless from 1868 on he held possession for a period of ten years as the tenant at will, or agent, or otherwise permissively, under the plaintiffs, the effect of which would be to revest the title in them.—*Allen v. Mansfield*, 82 Mo. 688; *Unger v. Mooney*, 49 Am. Rep. 100; *Echols v. Hubbard*, 90 Ala. 309; *Hoffman v. White*, 90 Ala. 354; *Atkinson v. Patterson*, 46 Vt. 750; *Williams v. Pott*, L. R. 12 Eq. 149.

In determining whether the possession of McAlester, after July, 1868, was that of the plaintiffs, in the sense necessary to divest out of the former and invest in the latter the title acquired by McAlester's possession prior to April 3d, 1868, if they found that such prior possession was of a character and duration to ripen title in him, it was competent for them to look at the evidence introduced by defendants with reference to the payment of taxes on the land as if it were his own by McAlester, and to the fact that he scheduled this land among his assets in the bankruptcy proceeding and claimed it therein as exempted to him; and it follows of course that the court did not err in overruling plaintiffs' objection to this evidence. The other aspect in which the admissions contained in the letters were for the consideration of the jury was this: If they found that McAlester's possession, prior to April 3d, 1868, had not for a period of ten years been adverse to plaintiffs, it then became a matter of controlling importance, of course, to determine whether his subsequent possession was adverse, either of itself for the statutory period, or for a sufficient length of time next before the inception of Mrs. McFarland's possession, as with the term of her holding and that of the defendants would amount to ten years. The bankruptcy proceedings and the payment of taxes, we may remark incidentally, were also competent in this connection as a part of the proof necessary to impress this subsequent possession with an adverse character. But it was only a part. If, in this event, the jury found from the correspondence between McAlester and Hanna that the former's possession at that time was held in subordination to and in recognition of the title of plaintiffs, or permissively under them, they could not find that McAlester's

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subsequent possession was adverse to the plaintiffs without *proof*—evidence satisfactory to them—that it was held in hostility to plaintiffs' title, and that the fact of such hostility, involving a repudiation of the permissive or subordinate character of the possession as it existed in 1868, *was brought home to the plaintiffs* ten years before this suit was instituted. Being in the possession as the tenant or agent of plaintiffs, or holding in any way for them and in recognition of their title in July, 1868, they had a right to assume that the character then impressed on the possession by these facts continued so long as it was not disavowed or repudiated, and the disavowal or repudiation brought to their knowledge; and their failure to assert their title under these circumstances is to be ascribed to their continued willingness that McAlester should hold for them and in their right, and not to their acquiescence in his wrongful disseizin, since knowledge is always an essential element in acquiescence, and knowledge of a wrong must always be shown before a party can be said to have lost his right to redress it by delay in its assertion. Where there are no relations between the owner and the party in possession, nothing upon which the possession can be referred to the owner's right, he is presumed to know of its wrongful character, knowing, as he must, of the fact of possession. But where a relation does exist upon which the possession is referable to the title, the holder of that title is justified in assuming that the possession is subordinate thereto, and held in recognition thereof, until he knows to the contrary. No kind or degree of actual hostility will of itself convert such a permissive into an adverse possession. No sort of claim of ownership on the part of the party in possession will of itself have this effect. And while it may be open to the jury in some cases to find from the circumstances of the possession that the owner had notice of its hostile and exclusive character, no exclusiveness of possession, no hostility, no claim of right antagonistic to the title will *necessarily* in any case take the place of direct proof of knowledge on the part of the owner that the possession is no longer held in subserviency to him. At most in any case, the circumstances of hostility, exclusiveness and claim of right are only for the jury to consider as *tending* to show knowledge on the part of the owner, the argument being that the circumstances of the possession were such as that he *must have known them*, and from them, that the possession was no longer held under him and in recognition of his title.—*Woodstock Iron Co. v. Roberts*, 87 Ala. 436; *Burrus v. Meadors*, 90 Ala. 140; *Baucum v. George*, 65

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Ala. 259: *E. T. V. & G. R. R. Co. v. Davis*, 91 Ala. 619; *Bernstein v. Humes*, 78 Ala. 134; *DeJarnette v. McDaniel*, 93 Ala. 215.

When brought to the touch of the foregoing views charges 2, 3 and 4 given for the defendants are affirmatively bad. They each require the jury to find for the defendants if they should believe that McAlester's possession was open, notorious and held under a claim of right in himself, though the jury might also believe that the plaintiffs had no knowledge whatever that he asserted any claim to the land except under and in suberviency to their title.

Charge 11 given for defendants was misleading, and should not have been given. Of course, if McAlester was in the open, notorious and continuous adverse possession for ten years after the last recognition of plaintiff's title by the letter of July 17, 1868, he had title, but the jury would probably have understood the word *adverse*, as used in this charge, to mean a claim of ownership in hostility to the plaintiffs, when such claim, without proof of plaintiffs' knowledge of it, would not render the possession adverse to them.

Charges 6 and 7 given for defendants are mere arguments. The court was under no duty to give them, but its action in so doing would not work a reversal of the case.

Charge 12 was misleading: indeed it was invasive of the province of the jury. If the jury had found that McAlester's possession between 1851 and April, 1868, had vested title in him, it would not necessarily follow that this title remained in him and passed to Mrs. McFarland, and from her to the defendants, as the charge in effect declares. As we have seen, it was open to the jury to find that, if McAlester really had title in 1868, it had revested in the plaintiffs before the deed to Mrs. McFarland was executed, through, ten years continuous possession by McAlester subsequent to July 17, 1868, under and in subordination to the plaintiffs.

Charges 5 and 15 given for defendants are unobjectionable, except that the latter is argumentative.

Reversed and remanded.

[Buxbaum v. McCorley.]

Buxbaum v. McCorley.*Statutory Action of Ejectment*

99	537
124	408
99	537
144	531

1. *Pleadings in an action of ejectment.*—In an action of ejectment the defendant may withdraw his plea of not guilty and file a demurrer to the complaint.

2. *Same; pleas of not guilty and disclaimer.*—A plea of not guilty and a plea of disclaimer present incompatible defenses, and can not properly be pleaded together as defenses to the same action of ejectment.

3. *Action of ejectment; judgment therein carries costs.*—In an action of ejectment, where there is a plea of disclaimer, and it is shown by the evidence that the defendant has never claimed title to, or ownership of the lands sued for, but that he was in actual possession of a small part of the land in controversy, his plea of disclaimer was to this extent not sustained, and the court in rendering judgment for the plaintiff should have allowed him his costs.

APPEAL from the District Court of Lauderdale.
Tried before the Hon. W. P. CHITWOOD.

EMMETT O'NEAL, for appellant.

SIMPSON & JONES, *contra*.

COLEMAN, J.—Plaintiffs, appellants, sued in ejectment to recover a small strip of land, of about three acres. To the complaint the defendants at first entered the plea of "not guilty." By leave of the court, the plea was withdrawn, and defendant demurred to the complaint, for indefiniteness in the description of the land. The court sustained the demurrer, and plaintiff amended the complaint.

There was no error in allowing the defendant to withdraw his plea of "not guilty" and filing a demurrer. The original complaint was defective in the matter to which the demurrer was directed, and the court did not err in sustaining it. To the complaint as amended the defendant filed four pleas.

1st. "That he disclaims as to all lands sued for not embraced within the lands, described as follows." Here follows certain lots and parcels of land described with great particularity. The second plea was as follows: "And as to all lands sued for embraced within the boundaries of the lands in the 1st plea particularly described the defendant

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pleads not guilty." The third and fourth pleas were adverse possession of ten and twenty years of the lands described in the first plea.

The bill of exceptions states that "to his amended complaint, defendant filed a plea disclaiming possession of the land sued for." A plea of disclaimer, and a plea of not guilty, present incompatible defenses, and cannot properly be pleaded together as a defense to the recovery of the same land in an action of ejectment. *McQueen v. Lampley*, 74 Ala. 408.

The bill of exceptions states that the plaintiff objected to the filing of the plea of disclaimer, and moved to strike it from the file, basing both motions upon the ground that the plea of not guilty, to the original complaint, "was an admission of possession, as to the lands sued for in the amended complaint." The reason assigned in support of the motion is without merit, and there was no error in overruling the motion.

The case was tried by the court, without the intervention of a jury. It is nowhere stated what was the issue tried, and it is somewhat difficult to determine this question from the judgment rendered. The judgment-entry is, "all matters in controversy in this case being submitted to the court, and the court, after hearing the evidence, and argument of counsel, upon mature consideration of the same, finds for the plaintiff for the land sued for, in their amended complaint, but without cost or damages. It is therefore considered by the court that the plaintiff have and recover of the defendant the said land sued for in said amended complaint, to-wit: . . . and judgement is hereby rendered against the plaintiff for cost," &c.

If we consider this judgment as rendered upon issue joined upon the plea of disclaimer, or upon "not guilty" or both pleas, the finding of the court for the plaintiff, "and that he recover of the defendant the land sued for" entitled the plaintiff to recover his cost.

On the other hand, if the issue was joined upon the plea of disclaimer and the evidence sustained the plea, then the court should have found the issue for the defendant, and not for the plaintiff as stated in the judgment entry. On such finding for the defendant, the plaintiff may have judgment for his land, but without cost. It seems clear from all the evidence that the defendant has never claimed title to and ownership of the lands described in the amended complaint. The dispute seems to have arisen as to the exact boundaries of the parcel of land sued for, and as to

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whether they included a certain spring of water, all of which might have been ascertained and adjusted by a careful survey, without recourse to litigation. The proof satisfactorily shows, that defendant was in the actual possession and cultivation of a small fractional part of the three acres sued for at the time suit was brought, but not under a claim of ownership. To this extent his plea of disclaimer was not sustained by the proof, and the plaintiff was entitled to his verdict, for this portion of the land at least and his cost. This should have been the judgment of the court, and a judgment to this effect will be here rendered, giving the plaintiff his cost.

Corrected and affirmed.

Capital City Water Co. v. Carey.

Action to recover Money had and received.

1. *Action for money had and received; when not maintainable.*—If, in an action to recover from a water company, as money had and received, an amount paid under protest, in settlement of a water bill, it is shown that plaintiff allowed an unnecessary waste of more water than she actually paid for, at the usual and customary rates, there is no equity in plaintiff's claim, and she is not entitled to recover.

APPEAL from Circuit Court of Montgomery.

Tried before the HON. JOHN P. HUBBARD.

This action was brought by the appellee, Jennie A. Carey, against the Capital City Water Company to recover, as money had and received, the amount paid by the plaintiff in settlement of a bill held by the defendant against the plaintiff for water consumed by her. The cause was tried by the court without the intervention of a jury.

The facts of the case are sufficiently stated in the opinion.

Judgment was rendered for the plaintiff, and the defendant appeals.

J. M. FALKNER, for appellant, cited *Comer v. Bankhead*, 70 Ala. 136; *Mobile v. L. & N. R. R. Co.*, 84 Ala. 115; *Sherward v. Citizens' Water Co.*, 90 Cal. 635.

GORDON MACDONALD, *contra*, cited *Busby v. Chesterfield Waterworks and Gas Light Co.*, 96 Eng. Com. Law Rep. 176;

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Weaver v. Cardiff, &c., 48 L. T. N. S. 906; *Sheffield Water Co. v. Carter*, S. L. Rep. S. B. Div. 632; *State v. Jersey City*, 45 N. J. L. 246.

HEAD, J.—Action to recover \$14.50, money had and received, brought by appellee against appellant. Tried by the court below without a jury, and judgment for the plaintiff. On April 1, 1892, defendant presented to plaintiff its bill for water rent, amounting to \$21.50. The bill consisted of an advance charge of \$2.50 for the privilege of using 20,000 gallons of water during the quarter ending April 1st; \$1.50 for meter rent, and \$17.50 for excess of water consumed over 20,000 gallons, being 70,461 gallons, at 25 cents per 1000. Plaintiff objected to the bill, and placed the matter in the hands of her attorney, Gordon Macdonald, to adjust and settle with the defendant on the best terms he could obtain. After several interviews, the company agreed to reduce the bill to \$14.50, and Macdonald paid it for plaintiff at that sum; but he claims he paid it under protest, and plaintiff insists upon a state of facts to show the payment was, in law, involuntary. The defendant's version is that the reduction and payment were expressly agreed on as a compromise and settlement of the whole dispute and threatened litigation. We do not find it necessary, however, to decide this question, since it is most manifest the plaintiff was not entitled to recover, for other reasons.

It appears the defendant was under a contract with the city of Montgomery touching its duties in reference to furnishing water to the inhabitants of the city. The 15th section of that contract is as follows: "That the domestic rates for water furnished under this contract to citizens of Montgomery shall never exceed the average rates paid in other cities of similar size; the present basis of rates shall be six dollars per annum for building of five rooms and less, and one dollar per annum for each additional room, other rates to be proportionate to these, as above ordained: said rates shall be such as to allow for the use of meters by consumers if they so select." Plaintiff's house had 8 rooms. Much of argument is addressed to us upon the proper construction of the several provisions of this clause of the contract, touching the right of defendants to charge for water at "meter rates" or "fixture rates," and what uses of water are comprehended within the term "domestic," or "domestic use," which, under the practically undisputed evidence, we do not think it necessary to consider. It is clear, under the most favorable construction of the contract to the plaintiff,

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the payment of the prescribed charges only entitled her to consume so much water as was reasonable and necessary to all her domestic uses; and beyond that, she could not suffer water to go to waste on her premises without incurring liability to defendant to pay its reasonable value. The evidence shows that from Dec. 31st, 1891, to Feb'y 12th, 1892, she suffered her pipes, on her premises, to leak to such an extent that a waste resulted of 80,000 gallons or more, over and above her ordinary and necessary consumption. The defendant, upon discovering or suspecting the leakage, in December, put in a meter; and on Feb'y 12th, 1892, it was thereby disclosed that the average use of water, during the preceding forty days, was 2,080 gallons per day. The meter was read three days later, which was manifestly after the leaks had been repaired, and the consumption was found to be 19 gallons per day; the next day it was 24 gallons; thirty days later it showed an average of 30 gallons per day, and on May 2d the average had been 57 gallons per day. Thus we have, as actually detected, an unnecessary waste of over 80,000 gallons within forty days. The plaintiff was charged with only 70,461 gallons as excess, amounting, at the usual and customary charges, as shown by the evidence, to \$17.50. The plaintiff paid only \$14.50 in settlement of the whole bill, and now brings the equitable action of money had and received to recover that. There is no equity in the case for the plaintiff, and judgment will be here rendered in favor of the defendant.

Reversed and rendered.

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29	641
108	204
90	541
119	634

Action upon Written Contract.

1. *Demurrer to part of plea.*—A demurrer, which is addressed to only a part of a plea is untenable; and if there are defects in certain portions of the plea, the remedy is by motion to strike out, by objection to evidence, or by instructions to the jury to disregard the defective allegations.

2. *Duplicity in a plea no ground of demurrer.*—A plea is not demurrable for duplicity.

3. *Demurrer to plea; when improper.*—When, in an action under a contract, to recover for work and labor done in grading for a railroad, the defendant pleads that it was understood and agreed that the

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measurements and estimates of the work to be made by the engineer of the railroad company should be conclusive upon the parties, and that all the work done was measured and estimated by the engineer on the first day of each month during the continuance of the contract, at which time the plaintiffs were either present, or could have been if they desired, and that the amount so ascertained was paid to the plaintiffs by the defendant before the institution of the suit, a demurrer to such plea, on the grounds, that it does not show that plaintiffs had any notice or opportunity to be present and to be heard, when the estimates were made, that such estimates were *ex parte*, and, in the absence of plaintiffs, not binding on them, is not maintainable and is improper; the proper way to raise the issue intended by the demurrer being by a replication.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the appellants against the appellees; and sought to recover under a written contract for work and labor done. The suit was for \$12,000, and judgment was recovered by the plaintiff for \$321.59. The plaintiffs prosecute this appeal, and assign as error the rulings of the court upon the pleadings. The facts having reference to such of the pleadings as are reviewed by this court are sufficiently stated in the opinion.

LANE & WHITE, for appellants.

JAMES WEATHERLY and WALKER PERCY, *contra*.

HARALSON, J.—The appellants, plaintiffs below, sued on a written contract, entered into by them and the defendants, wherein, in consideration of certain clearing, grubbing, masonry and grading of the railroad track of the Birmingham Mineral Railroad Company, in the construction of the road-bed in its building and extension, which the plaintiffs bound themselves to do, the defendants undertook, and agreed to pay them certain prices for the work to be done, averring that they had complied with all the provisions of said contract, on their part, and that defendants failed to comply with their provisions, on their parts, in that they have failed to pay plaintiffs for the work they did, at the prices agreed on and mentioned in the complaint, which sums, with the interest thereon, they sue to recover. The common counts were added.

The defendants pleaded nine pleas, to three of which, the 4th, 5th and 6th, with the demurrers and replications to them, and the demurrers alleged to be filed to the replica-

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tions, we are invited, by the assignments of error, to consider.

The 4th plea sets up, in substance, the same contract which is set up in the special count, as the basis of the action, and sets up additional terms of said contract, not set out in the special count, confessing that the defendants agreed to pay the plaintiffs for the labor and services contracted to be done and rendered, as set forth in said contract, but it was on the conditions and with the understanding and agreement, as stipulated in said contract,—which plaintiffs had not mentioned in their complaint,—that such labor and services were to be done and rendered, according to specifications annexed to said contract, as a part of it, and were to be classed, estimated, approved and accepted by the engineer of said railroad; the plaintiffs bound themselves in said contract, (1) not to assign or pledge, in favor of third parties, any money falling due under said contract, or retained by defendants as reserved percentages, under the terms of said contract; (2) to use no other powder for the work under said contract, but that furnished by defendants, at prices specified; (3) that they would keep at work a force capable and equal to completing the work contracted for, in a workmanlike manner, within the time stipulated for its completion; and (4) the plaintiffs would complete the work contracted by them to be done, on or before the 30th day of September, 1887; that defendants duly kept and performed all their obligations and undertakings in said contract specified, and the plaintiffs had failed to perform theirs. Four breaches of said contract are assigned in said plea, according to the four specifications of duties to be performed by the plaintiffs, as they are above set out, claiming \$13,000 damages, for each of the four several breaches. The defendants also claim, that, “by each of said four breaches, any balance due to plaintiffs under said contract,—towit, 15 per cent. of the amount paid or due for work or services rendered under said contract,—was, thereby, forfeited to defendants, under said contract, and became their property, to be by them forever retained.” The plea concludes, praying judgment for the several sums claimed as damage for each of said breaches, and, also, for the said forfeiture under each breach, and prays to be allowed to recoup such damages, to the extent of anything that may be owing plaintiffs, and a judgment for the balance.

The plaintiffs demurred to this plea, assigning five grounds, the first three of which are predicated on the mistaken assumption, that the pleader failed to aver how much

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damage the defendants claim by reason of each breach, whereas, the sum of \$13,000 is distinctly claimed, as damages for each separate breach. The fourth ground is untenable, if for no other reason, because it goes to a part of the plea. The remedy, if the assignment of the breach is bad, is by motion to strike out, by objection to evidence under it, or by instructions to the jury to disregard it.—*Kenyon & Bro. v. W. U. Tel. Co.*, 92 Ala. 399. And the fifth ground, that for duplicity, is not available under our system of pleading.—*Bolling v. McKenzie*, 89 Ala. 470.

The sixth plea is, that under and by virtue of said contract, it was understood and agreed, that the measurements, classification and estimates, monthly or final of said work, to be made by the engineer of said railroad company, should be absolute and conclusive upon the parties; and avers, that all work done by the plaintiffs, under the contract, was measured, classed and estimated by said engineer, on or about the first day of each month, during the continuance of the contract, at which time, the plaintiffs were either present, or could have been, if they desired, and the amount so ascertained, was paid to them by defendants, before the institution of this suit.

The plaintiffs demurred to this plea, on the ground, that the plea does not show, that they had any notice or opportunity to be present and to be heard, when said estimates were made, and they were *ex parte*, and in the absence of plaintiffs are not binding on them.

This was no sufficient reply by demurrer to the plea. The plea was good. A replication, rather than a demurrer, would have raised the issue intended by this demurrer.

The next assignment of error is, that the court erred in overruling plaintiffs' demurrer to defendants' 5th plea. We have been unable to find any such demurrer in the record.

The remaining assignments are, that the court erred in sustaining defendants' demurrer to plaintiffs' second replication to defendants' sixth plea; and in sustaining defendants' demurrer to plaintiffs' replication to defendants' 5th plea.

The only demurrer appearing to the second replication to the sixth plea,—and it seems to have no application to it,—is the one filed April 25, 1890, and it no where appears the court ever acted on it.

To the fifth plea plaintiffs filed two replications, one on the 30th, and another on the 31st of May, 1889. To these replications, defendants interposed two demurrers, one on

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the 25th of April, 1890, and the other, on the 25th of September, 1890.

On the 25th of September, 1890, the court overruled what was termed the "additional demurrer" to the replication to the fifth plea, and sustained the demurrer to the replication to the fifth plea. There is an apparent conflict in this ruling, but it is evidently due to clerical misprision in writing the judgment-entry, which ought to have been corrected in the court below.

From this, it may be inferred, that by the term "additional demurrer," is meant the one filed second in point of time, on the 25th of September, 1890, leaving as the only demurrer to the replication to this plea, the one filed on the 25th of April, 1890. But, we are puzzled to know to which one of the replications to the fifth plea the court sustained, and to which he overruled, the demurrer, since there are three replications, and there is nothing to indicate, more than we have stated, to which the demurrers were intended to apply.

There is great and perplexing confusion in the proceedings, and the manner in which the record appears. The demurrers and replications are not numbered, and do not appear in the record, in the order of their filing, and in the condition we find it, it is impossible for us to comprehend and pass intelligently on some of the errors assigned.

We find no error in the record, and the judgment is affirmed.

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Action Against a Railroad Company for Damages on Account of Personal Injuries.

1. *Common carrier; custom of receiving and discharging passengers at a place other than a regular station.*—If a common carrier is in the habit, or has the custom, of receiving and discharging passengers at a place other than a regular station on its road, a passenger, who, knowing of such custom, attempts to board a train at such place, is as much justified in the assumption that the carrier's cars are in a safe condition, as he would be were he attempting to board them at a regular station.

2. *Action for damages; averments of complaint.*—In an action against a railroad company for injuries, alleged to have been suffered by the

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plaintiff while attempting to board a train, by reason of a handle on one of the cars giving way, it is necessary that the complaint should aver that the plaintiff attempted to board the train at a station provided for passengers, or at a place where it is usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the car, or that he was, in some manner, accepted as a passenger.

3. *Same*.—An averment in the complaint, that "plaintiff was in the act of getting on one of defendant's passenger cars as a passenger, as he had the right to do," is a mere statement of the pleader's conclusion, and no weight can be accorded it in determining the sufficiency of the complaint.

4. *Same; pleadings construed against the pleader*.—The averments in a complaint that the plaintiff attempted to board the train when it was a short distance south of where the defendant's road crosses another railroad, does not, by reason of the statute requiring all trains to stop before crossing the track of an intersecting road within one hundred feet of the crossing, raise the inference that the defendant's train was at rest when the plaintiff attempted to board it, it not being averred that the train was on a north-bound trip, and had approached within one hundred feet of the crossing

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This was an action brought by the appellee, William Liddicoat, by his next friend, against the North Birmingham Railway Company, to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant.

The allegations of the complaint and the facts, as disclosed by the record, are sufficiently stated in the opinion. The defendant interposed a demurrer to the complaint upon the following grounds: 1st. Because it does not allege that the defendant's train was at a station or regular stopping place, where passengers were received and discharged, when the plaintiff attempted to get aboard the train. 2d. Because it does not allege that the defendant or its servants knew or could have known that William Liddicoat was attempting to get aboard the train when he received the injuries complained of. 3d. Because the complaint shows that plaintiff was guilty of contributory negligence that was the proximate cause of the injuries complained of by him, and does not allege that the defendant was guilty of wanton or intentional negligence. The court overruled each of these grounds of demurrer, and the defendant duly excepted thereto. There was judgment for plaintiff, and defendant appeals.

GARRETT & UNDERWOOD, for appellant, cited *North Birmingham Street Railway Co. v. Calderwood*, 89 Ala. 247; *M.*

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& *C. R. R. Co. v. Womack*, 84 Ala. 150; *Ga. Pac. R. R. Co. v. Blanton*, 84 Ala. 154.

CHAS. P. JONES and W. R. HOUGHTON, *contra*, cited *L. & N. R. R. Co. v. Johnston*, 79 Ala. 436; *A. G. S. R. R. Co. v. Sellers*, 93 Ala. 9; *B. & O. R. R. Co. v. Kane*, 69 Md. 11.

STONE, C. J.—Appellee, a minor between eleven and twelve years of age, sued appellant, a street railway company, operating cars with dummy engines, to recover damages for alleged injuries sustained by plaintiff while attempting to board one of appellant's trains. The train he attempted to board was going from the city of Birmingham to North Birmingham, and was approaching a point where the Birmingham Mineral Railroad Company's tracks cross appellant's tracks, when it came to a stop just before reaching the crossing, and then proceeded on its way. Appellant has passenger stations at short intervals along its road, one of which is located about two hundred feet north of the intersection of the two roads, but it has no station at the point where appellee attempted to enter its car. It was, however, a common, if not daily, occurrence for persons to take advantage of the momentary stoppage of the train as it approached the crossing, to board or alight from its cars, and it does not appear that this practice was ever prohibited, or objected to, by appellant, or its servants in charge of its trains. The habitual stopping of the train at this point was in consequence of the requirements of the statute, (Code, § 1145), and not for receiving and discharging passengers, though that had become a frequent, if not daily occurrence, as stated above.

On the 23d of March, 1891, appellee was standing on the side of appellant's track, either upon or near the roadway of the intersecting road, when appellant's train, consisting of an engine and two cars, approached the crossing, going north. One of the cars was an ordinary passenger coach, and the other an open car having running boards extending along each side, which furnished a step to passengers getting on or off the car. Appellee attempted to board one of the cars but fell, and one of the trucks passed over and crushed his leg, necessitating amputation. For that injury this suit was brought.

Whether appellee, when he attempted to board the train, was standing on the track of the intersecting road, and attempted to get on the car while the train was in motion, or whether he was south of the crossing and the train at

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rest when he made the attempt, are questions as to which the testimony is conflicting. There is also direct conflict in the testimony as to the cause of appellee's fall. His statement is, that he undertook to board the open car while the train was at rest, south of the crossing, the open car being next to the engine; that he stepped on the running board and seized with his hand the arm or support attached to the car to assist passengers in getting in and out of the car; that one end of the arm or support broke loose from its fastenings and precipitated him upon the track.

The engineer, on the other hand, testified that he was looking at appellee when the accident occurred; that he saw him, as the train was passing, standing on the roadway of the Birmingham Mineral Railroad Company at its intersection with appellant's road, and that the box passenger coach being next the engine, appellee jumped on the rear steps of that car and seized hold of the railings; that he lost his hold and fell on the track and the front truck of the rear car passed over his leg; that the railing of which he took hold did not break loose, and was not out of repair. There is other testimony seemingly corroborative of each of these versions of the accident.

The averments of the complaint, so far as material to be noticed, are that "on the day and year aforesaid, at a point in North Birmingham on defendant's line of road, a short distance south of where the defendant's road crosses the Birmingham Mineral railroad, the plaintiff boarded, or attempted to board, or attempted to, and was in the act of, getting on one of the defendant's passenger cars, as a passenger, as he had the right to do; that the car the plaintiff was attempting to get on was an open car with a running board on each side for passengers to get on and into the car; that on each of the seats of said car was a handle or arm made and used for the purpose of enabling passengers to catch hold of the same to enable them to pull themselves into the car; that plaintiff caught hold of one of these handles or arms and was pulling himself into the car, when the handle or arm turned or broke, whereby plaintiff was thrown to the ground and under the car, and his leg was run over," &c.

There was a demurrer to the complaint which was overruled. The defendant then pleaded the general issue and contributory negligence on plaintiff's part. The errors assigned are the rulings of the court on the demurrer to the complaint, on the charges given and refused, and on the motion for a new trial.

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It may be declared as a general rule that the relations of carrier and passenger are founded in contract, either expressed or implied, made upon a valuable, but not necessarily a pecuniary consideration, "and when such relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law exacts of him who supplies that agency the duty of exercising care in its selection, maintenance in repair and operation."—2 Am. & Eng. Encyc. of Law, p. 739. The relation begins "when the contract of carriage having been made, or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises or has entered any means of conveyance provided by the carrier." 2 Am. & Eng. Encyc. of Law, p. 244.

It is the duty of the carrier to provide safe and convenient stations, and means of ingress to and egress from its cars; and if a person has the *bona fide* intention of taking passage by a train and goes to a station at a reasonable time, he is entitled to protection in these respects, as a passenger, from the moment he enters the carrier's premises.

The carrier may, by proper notice, prohibit the receiving or discharging of passengers at other places than the stations provided by it, and persons attempting, uninvited, to board its trains at such other places, in the absence of wanton or willful negligence on the part of the carrier, act at their own peril until they have entered its carriage, or are accepted as passengers.

If, however, a carrier, is in the habit of receiving or discharging passengers at a place other than a regular station, or persons are invited or directed by its authorized servants to board, or alight from its cars at such other places, they have the right to presume that it is safe to board or quit the train at such place, unless the risk in doing so is so obvious that a man of ordinary care and prudence would not, under like circumstances, make the attempt.—*Balt. & Ohio R. R. Co. v. Kane*, 69 Md. 11.

It is immaterial for what purpose its cars are stopped at such place, other than a regular station, whether in consequence of a duty enjoined on it by law, as when approaching the track of an intersecting road, or arising from convenience or necessity in the usual mode of operating its trains. If the public are in the habit of entering or quitting its cars at such place, without objection from its agents or servants, such persons are entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular stations, except in so far

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as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use. The customary use of such place for receiving and discharging passengers may become so generally known and well established as to impose upon the carrier the duty of maintaining such place in as safe and convenient condition as a regular station, and to authorize a passenger, without notifying the conductor, or other servant of the carrier, of his desire or intention to board the train, to presume that a reasonable opportunity will be afforded him for that purpose, and that it is safe to do so. A passenger attempting to board a train at such place, and under such circumstances, is as much justified in the assumption that the carrier's cars are in a safe condition, as he would be were he attempting to board them at a regular station; for the duty of the carrier to so maintain them attaches in all cases and under all circumstances where the relation of carrier and passenger exists either by express contract or by implication of law.

What has been said has no application to a person who, being at either a regular station, or a place of customary use for receiving and discharging passengers, has not a *bona fide* intention of boarding a train as a passenger, but simply intends or attempts to obtain passage without the knowledge and consent of the carrier's servants or employes, and without paying fare. Such a person would in no sense be a passenger, but a trespasser to whom the carrier would owe no higher duty than to refrain from wanton or willful negligence; or, upon discovering him to be in a position of peril, to employ such reasonable care, as the facilities at hand would permit, to avoid the threatened injury.—*L. & N. R. R. Co. v. Webb*, 97 Ala. 308; 12 So. Rep. 374; *M. & C. R. R. Co. v. Womack*, 84 Ala. 149.

But the failure of the carrier to maintain its cars in repair would not, as respects such person, be either wanton or willful negligence, however gross such negligence might be, and for an injury resulting under such circumstances, the carrier would not be answerable in damages to the person injured.

Whether or not a person is a passenger is generally a question for the jury, and, always so when different inferences may be drawn from the testimony.—*Brown v. Scarborough*, 97 Ala. 316; 12 So. Rep. 289.

There is testimony in the case before us tending to show that appellee was, when injured, attempting to board one of appellant's cars with the *bona fide* intention of riding thereon, upon paying the customary fare; while, on the other

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hand, there is testimony tending to show that his attempt to board the train, at the time and place mentioned, was prompted by a mere boyish propensity; in common parlance, to "steal a ride," as he had done or attempted to do on other occasions; and if the testimony on another trial should be substantially as we now find it, the question will be one for the jury under proper instructions from the court.

It can not be affirmed as a universal proposition of law that it is negligence *per se* for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances enter into the question; and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt.—*Balt. & Ohio R. R. Co. v. Kane*, 69 Md. 11; *M. & E. Rwy. Co. v. Stewart*, 91 Ala. 421.

All the questions for review in this case may be solved when tested by the principles we have above formulated.

Taking up the demurrer to the complaint, and construing, as we must, the averments of the latter most strongly against the pleader, we are unable to declare that the complaint shows on its face that the relation of carrier and passenger legally existed between appellant and appellee at the time the alleged injury was suffered. It is not averred that appellee was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers on its cars, or that appellee was invited or knowingly permitted to attempt to board the car by any authorized servant or employe of the company, or that he was, in any manner, accepted as a passenger. In the absence of averments showing an express contract of carriage, or of facts from which such contract is implied in law, no relation is shown to have subsisted between the parties at the time of the accident, that devolved upon appellant the duty towards appellee of maintaining its cars in repair. Failing in this respect, and there being no averment that the injury was caused by the wanton or willful negligence of the company, no cause of action is shown for which it is answerable to appellee.—*L. & N. R. R. Co. v. Hairston*, 97 Ala. 351; 12 So. Rep. 299; *Ensley Rwy. Co. v. Chewning*, 93 Ala. 24.

We are not unmindful of the averment in the complaint that "plaintiff was in the act of getting on one of the defendant's

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passenger cars *as a passenger, as he had the right to do,*" but these words are the mere averment of the pleader's conclusion. No facts are stated, and no weight can be accorded them in determining the sufficiency of the complaint. They are perfectly consistent with a most heedless attempt to board the train when in motion, and at a place not set apart by any order or usage of the company for receiving passengers. Moreover, there is an almost irresistible implication that when the attempt was made to board the car, the train was in motion.

There is a manifest distinction in this respect between the complaint in this case and that in *L. & N. R. R. Co. v. Jones*. 83 Ala. 377. In the latter, the averment that the plaintiff's intestate was a passenger is supported by the statement that she was in the defendant's coach, a position which, of itself, *prima facie* indicated the relation of passenger; while here, there is no fact averred in the complaint which indicates that appellee had become, or was in a position entitling him to become, a passenger in appellant's train at the time of the accident.

When we look to the averments of fact in the complaint, as controlled by the intendments against the pleader, it must be inferred from the complaint that appellee's attempt to board the train was at a place where he was not authorized or invited to make the attempt; that the cars were in motion at a rate of speed which would have deterred a man of ordinary care from making the attempt under like circumstances, and that in making such attempt appellee was a trespasser.—*Montgomery v. A. G. S. R. R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley Rwy Co. v. Chewing*, 93 Ala. 24.

It is contended in argument for appellee that it must be inferred that the train was at rest, when appellee undertook to board it, because of the averment that appellee's attempt to board was made when the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad," and because of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting road.

There are conclusive reasons why this argument can not prevail. Although the court takes judicial knowledge of the requirements of the statute, and it is averred in the complaint that appellee's train was south of the crossing, it is *not* averred that the train was on a north bound trip. Indulging the view most unfavorable to the pleader, as we must, the train at the time of the accident was south bound and, therefore, according to the complaint, had passed the

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intersecting road, and, consequently, the point where it was required by the statute to come to a stop.

On the other hand, if we could assume the train was north bound, it is not averred it had approached *within one hundred feet* of the crossing, when plaintiff undertook to board it, that being the distance from the crossing at which it was required by the statute to come to a full stop. The averment that the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad" is not the equivalent of an averment that the train was within one hundred feet of the crossing. This last fact is not necessarily implied in the averment made. The inference does not arise, as matter of law, from the facts averred in the complaint, that appellant's train was at rest when appellee attempted to board it, but, as we have shown, the intendments on demurrer are to the contrary.

It results from the foregoing principles that the first and second grounds of demurrer to the complaint should have been sustained; and in view of the intendments against the pleader, as above indicated, it may be the third ground of demurrer should have been sustained, notwithstanding contributory negligence is ordinarily matter of defense. We cite the following authorities: *L. & N. R. R. Co. v. Hairston*, 97 Ala. 351; 12 So. Rep. 299; *Montgomery v. Ala. G. S. R. R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley Rwy. Co. v. Chewning*, 93 Ala. 24.

The charges given and refused by the court, on which the remaining assignments of error are based, need not be specially noticed. The principles we have announced will furnish sufficient guide on another trial.

For the error of the City Court in overruling the demurrer to the complaint, its judgment is reversed and the cause is remanded.

Moody v. Alabama Great Southern Railroad Co.

Action for Damages, for Killing Cattle by a Railroad Train.

99	553
101	126
99	553
121	475
129	386

1. *General affirmative charge.*—When, in an action against a railroad company to recover damages for the killing of a cow, there is evidence from which the jury could infer that defendant's employees were

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negligent in not averting the accident, it is error to give the general affirmative charge for the defendant.

2. *Objection to depositions.*—Although a deposition is taken without the affidavit required by section 2802 of the Code being made, it should not be excluded on objection and motion made to it after the commencement of the trial.

3. *Argument of counsel to the jury.*—In an action against a railroad company to recover damages for the killing of a cow, a statement by the plaintiff's counsel in his argument before the jury, that "the witnesses were bound to testify as they did; that if they had testified differently, they would have been promptly discharged," when wholly unsupported by the evidence, is properly excluded.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. S. H. SPROTT.

This is an action to recover damages for the killing of a Galloway cow, and was brought by the appellant, F. S. Moody, against the appellee corporation. This is the second appeal.—90 Ala. 46. After the reversal of the cause, the second trial in the Circuit Court resulted in a judgment for defendant. The defendant admitted the killing of the cow by one of its trains at the date and place mentioned in the complaint, but denied any liability therefor. The testimony for the defendant was to the effect that the train, the engine of which killed the cow in question, was properly manned and equipped with skillful, competent, and careful men and good machinery; that the engineer was at his post and keeping a proper lookout; that he saw the cattle on the track before he came up to them; that he blew the cattle alarm, and blew for brakes; that he brought his train to nearly a full stop, and that after the cattle had left the track he started his train up again; that after the train got under headway the cow, which was killed, ran back on the track, right in front of the engine; that he could not possibly have stopped his train then in time to have averted the accident; and that the engineer did all that he could to prevent the accident. The evidence for the plaintiff, as testified by the witness Hamner, tended to show that near the place where the cow was killed, there were tracks of several cows going up on the railroad track, and after getting on the railroad track, the said tracks could be seen for about 40 yards, and all the tracks then left the railroad track, except the tracks of one cow, which went about 20 yards further, and then disappeared, and that opposite this place on the track, where the tracks of the cow disappeared, the body of the cow was found, at the bottom of the embankment.

Upon the defendant offering to introduce in evidence the deposition of one William T. Ham, who was the conductor

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on the train that killed the said cow, the plaintiff objected, and moved the court to suppress the deposition, on the ground "that the answer of said witness to the interrogatories showed that he was a resident of Birmingham, and within 100 miles of the place of trial; and upon the further ground, that no affidavit was filed with the clerk of the Circuit Court in the said case, as required by law, as a basis for filing interrogatories, and taking the deposition of said witness Ham." But the court overruled the plaintiff's objection and motion, and allowed the said deposition to be read in evidence, "the case having been entered upon and the plaintiff having introduced his evidence, and rested his case, before any objection was made to the introduction of said deposition." To this action of the court the plaintiff duly excepted. The part of the argument of the plaintiff's counsel which was ruled out by the court is stated in the opinion. To this action of the court the plaintiff duly excepted. There was judgment for the defendant, and the plaintiff prosecutes this appeal, and assigns as error the several rulings of the lower court, to which exceptions were reserved.

FRANK S. MOODY, for appellant.—The general affirmative charge should not have been given for the defendant.—*Seals v. Edmondson*, 73 Ala. 295; *Hall v. Posey*, 79 Ala. 84; *Tait v. Murphy*, 80 Ala. 440; *DePoister v. Gilmer*, 82 Ala. 435; *Ala. Gold Life Ins. Co. v. Mobile Mutual Ins. Co.*, 81 Ala. 329; *Luke v. Calhoun County*, 52 Ala. 115; *Belisle v. Clark*, 49 Ala. 98; *McGehee v. Harrison*, 51 Ala. 522; *Carter v. Shorter*, 57 Ala. 253. The deposition of the witness Ham should have been excluded from the jury.—*Parker v. Haggerty*, 1 Ala. 633; *Wright v. Smith*, 66 Ala. 545; *Parsons v. Boyd*, 20 Ala. 122; *Shield v. Dothard*, 59 Ala. 595; *Sims v. Jacobson*, 51 Ala. 186. The plaintiff's counsel should have been permitted to comment upon the testimony of the defendant's witness in the manner attempted.—*E. T., V. & G. R. R. Co. v. Bayliss*, 75 Ala. 471.

A. G. SMITH, *contra*.—The court did not err in giving the general affirmative charge in favor of the defendant.—*A. G. S. R. R. Co. v. Moody*, 90 Ala. 46. The objection to the deposition of the witness Ham and the motion to exclude the same were properly overruled.—*R. R. Co. v. Maples*, 63 Ala. 601; *Cornelius v. Partain*, 39 Ala. 473; *May's Heirs v. May's Admr.*, 28 Ala. 141; *Thompson v. Rawles*, 33 Ala. 29; *Hudson v. Howlett*, 32 Ala. 478; *Morgan v. Wing*, 58 Ala.

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301; Code of 1886, § 2810. The remarks of plaintiff's attorney which were excluded by the court were not supported by the evidence, and, therefore, the court did not err in its ruling thereon.—*E. T., V. & G. R. R. Co. v. Bayliss*, 75 Ala. 471.

McCLELLAN, J.—This is the second appeal in this case. On the former appeal it was held that the evidence was free from conflict or adverse inference to the negation of all negligence on the part of defendant's trainmen in respect of the killing of plaintiff's cow, and hence that the general affirmative charge with hypothesis should have been given for defendant.—*Ala. Gr. So. R. R. Co. v. Moody*, 90 Ala. 46. When the case came on for trial again below, the court was of opinion that the evidence adduced was the same as upon the first trial, and therefore charged affirmatively for the defendant. A verdict was returned accordingly, and from the judgment thereon this appeal is prosecuted. This court was at first of the opinion that the evidence on the two trials was the same, that it showed without conflict that defendant was not negligent, and that the trial court properly gave the affirmative charge for defendant. We have come to a different conclusion, however, on the application for rehearing, and the former opinion on this appeal is withdrawn. On the last trial the witness John Hamner testified to facts from which the jury might legitimately have inferred that the animal did not come upon the track and stop so immediately in front of the engine that it was impossible to avoid striking her, as deposed to by the trainmen, but that, to the contrary, it got on the track *some distance in front of the engine, and ran along it for sixty yards before being overtaken and killed by the train*. This evidence was not in the case on the first trial, or, at least, was not presented here by the bill of exceptions taken on that trial. If the jury believed Hamner, they could not believe the account given of the accident by the engineer; and, believing Hamner, they had a right to infer that defendant's employes were negligent in not stopping the train, or so slackening its speed as to admit of the escape of the animal. The charge given by the trial court deprived the jury of this right, and was therefore erroneous. *M. & B. R. R. Co. v. Ladd*, 92 Ala. 287.

The statute provides that "all objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial." Code, § 2810. It is in-

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sisted for appellant that this statute "means a deposition taken pursuant to section 2802 of the Code," and has no application to or bearing upon a paper filed in the cause as a deposition, and offered on the trial as such, and which is in the form of a deposition, but which appears on its face not to have been regularly taken in that, for instance—the present case—the preliminary affidavit has not been made as required by the section last referred to. This construction, we think, is entirely too narrow. Its adoption would lead to the practical emasculation of the statute quoted first above, since objections to entire depositions are, in many if not most instances, based upon some infirmity of the deposition resulting from non-conformity to section 2802. We apprehend the true interpretation of the act to be such as to make it applicable to every paper filed in a cause which is in the form of a deposition taken therein, wholly irrespective of the defects it discloses in the manner of taking it. In one sense no paper in this form which the court adjudges to be inadmissible is "a deposition," and the judgment of exclusion is essentially a judgment that it is not a deposition; but manifestly this is not the sense of the word as used in section 2810, else the operation of that section would be confined to depositions regularly taken in all respects, but containing no evidence relevant to the issue—a case which could rarely occur and in which, when it does occur, the statute, if it applies at all, might be easily avoided by making separate motions to exclude different parts of the deponent's testimony. We are clear that a deposition, the infirmity of which lies in the absence of the affidavit required by section 2802, should not be excluded on a motion made after the commencement of the trial; and hence that the court's action on the objection made by plaintiff, after the trial had been entered, to the deposition of the witness Ham as an entirety was free from error.

It does not appear of this record that the court *prevented* any line of argument on the part of plaintiff's counsel as is here insisted. What was done is thus stated in the bill of exceptions: "Plaintiff's counsel, in addressing the jury in his argument, stated, 'the witnesses, whose depositions had been read and who were employes of the defendant, were bound to testify as they did; that if they had testified differently they would have been promptly discharged.' Counsel for defendant objected to this argument, and asked the court to rule it out, which motion the court granted." This action of the court was not with reference to counsel's further argument, but solely upon and with reference to a state-

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ment wholly unsupported by evidence, which had already been made in argument. That this statement was improper and properly ruled out by the court, we do not doubt. *E. T. Va. & Ga. R. R. Co. v. Bayliss*, 75 Ala. 471; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548. It is not conceivable that this action of the court could have denied to plaintiff the benefit of any legitimate argument his counsel might thereafter have seen proper to advance.

For the error pointed out the judgment is reversed, and the cause remanded.

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Bill in Equity to rescind Contract.

99	558
113	476
99	558
131	637

1. *Fraudulent misrepresentations; averments in bill to rescind contract.*—When a bill, filed to rescind the sale of land, on the ground of fraudulent concealments and misrepresentations, sets forth facts showing the particular concealments and misrepresentations relied on, and avers that these misrepresentations were as to matters material, and not the mere expression of opinion of the defendant, and that complainants were induced thereby to enter into the contract, its averments are sufficient in this regard to justify the relief asked.

2. *Same; executed contract can be rescinded therefor.*—A misrepresentation by one of the parties to a contract of sale, in regard to a material fact which operated as an inducement to the other party, upon which he had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, although wholly executed, if the attempt is seasonably made.

3. *Averments of bill to rescind contract.*—A bill to rescind a contract, whereby the complainants conveyed to defendant certain lands, in consideration of the transfer to them of certain mortgages, on the ground of misrepresentation by defendant as to the title of the mortgagors to the realty, and the existence of the personalty at the time of the mortgage, need not negative the solvency of the mortgagors, nor aver that the debts secured by the mortgages were not enforceable otherwise than by the foreclosure of the mortgages.

4. *Same*—A bill filed to rescind a contract for fraudulent misrepresentations, which alleges that said misrepresentations were as to material facts, and were conducive to the transaction, is not demurrable on the ground that the representations were not such as the complainants had a right to rely upon, since they might, by the exercise of diligence, have ascertained their falsity.

5. *Same; transfer to third party.*—If, in a bill to rescind a contract, whereby complainants conveyed to defendant certain land in consideration of the transfer to them of certain mortgages held by the defendant, on the ground of fraudulent misrepresentations as to the property conveyed in said mortgages, it is shown that the complain-

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ants assigned such mortgages for value and without recourse to a third person, and afterwards accepted a re-assignment without recourse on such third person, the complainants are not entitled to the relief prayed for, unless the bill further avers such facts as imposed a legal or equitable obligation on the complainants to accept such re-assignment.

6. *Same; complainants' knowledge of the falsity of the representations.*— If it is not alleged in, or inferrible from, the averments of the bill, that the complainants knew the falsity of the representations at the time of the transfer by them to such third person, they are entitled to the rescission of the contract, notwithstanding by such assignment of the mortgages, the alleged fraud was condoned, the transaction infected by it ratified, and the complainants may have been guilty of *laches* in the institution of their suit.

APPEAL from Chancery Court of Tuscaloosa.

Heard before the Hon. THOS. COBBS.

On March 29, 1889, Charles M. Maxwell and J. W. Sanders filed their bill of complaint against C. C. Baker; and sought to have rescinded a contract of sale, entered into between the complainants and the respondent on June 21, 1889. The contract, the rescission of which is prayed for in said bill, was that the complainants, who were the owners of a lot designated as lot No. 46 in the town of Tuscaloosa, conveyed unto the respondent, Baker the said lot, in consideration of the said Baker transferring to them three certain mortgages as follows: One from T. B. Jones and wife to C. C. Baker, upon certain real and personal property, and the other two to C. C. Baker from T. B. Jones and C. C. Jones, respectively, upon certain personal property.

The ground upon which the complainants ask for relief is the fraudulent concealment and misrepresentation as to the title of the property conveyed in the mortgages. The bill avers that at the time the complainants executed to said Baker their deed of conveyance to the lot No. 46, and before delivering said deed, the said Baker assured them, "that it was not necessary that they should examine into the title to the lands mentioned in the mortgage of T. B. Jones, and his wife, F. E. Jones, to said C. C. Baker, as shown by exhibit C., for he, (said Baker) himself had investigated said title, and that said T. B. Jones had, at the time he executed said mortgage, shown by exhibit C., to said Baker, a good and perfect title to said lands therein conveyed. Orators further state and charge that upon the faith of these representations made to them by said Baker, they conveyed to him lot No. 46, in the city of Tuscaloosa, and received as payment therefor said mortgages, as shown by Ex. C., Ex. D. and Ex. E.; and orators further state and charge that relying on the state-

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ments as to the title to the lands conveyed in the mortgage marked Exhibit C., which were so positively made to them by said Baker, they allowed said Baker to transfer said mortgage to them without recourse on him; and orators state that they would themselves have investigated the title to the said lands conveyed in the mortgage marked Exhibit C. before executing to said Baker their deed of conveyance to the lot No. 46, and would have required said Baker to guarantee to them the payment of the amount said mortgage was given to secure, had it not been for the false and fraudulent representations then made to them by said C. C. Baker; and orators state that they believed to be true said representations then made to them by said Baker, and said representations were the inducement which caused orators to convey lot No. 46 to said Baker, as aforesaid; and orators state and charge that the representations made to them by said Baker as aforesaid were as to a material fact; were made with the intent on the part of said Baker, that they should be acted upon by orators; were made intentionally, and by design to defraud orators, with the knowledge on the part of said Baker, that they were false."

By amendment the bill also averred that some of the personal property described in, and purported to be conveyed by, the mortgages, was, at the time of the transfer to the complainants, dead, and a large portion of it was inserted in the mortgage after its execution; that these facts were known to the respondent, Baker, at the time of said transfer, and that notwithstanding this knowledge he falsely and fraudulently represented that the mortgages did, in fact, convey the personal property described in them, and fraudulently withheld from the complainants the truth in reference to said personal property. It is shown by the endorsements on each of the three mortgages, which were made exhibits to the bill, that on July 31, 1888, the complainants transferred them to the J. Snow Hardware Company without recourse, and that on March 15, 1889, the J. Snow Hardware Company re-transferred them to the complainants without recourse.

The respondent demurred to the bill, on the grounds:

1st. That the allegations of the bill are not sufficient to warrant the relief prayed for, as they are averments of the opinion of the pleader, and are conclusions of the pleader.

2d. The contract which is sought to be rescinded is wholly executed.

3d. There is nothing in said bill going to show that the complainants could not, at any time have taken

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possession of the property conveyed in said mortgage, or that the mortgagors were never in possession of said lands.

4th. The bill fails to aver that the complainants have been or might be put to expensive law suits in collecting any or all of said notes, or that they have ever attempted to collect said notes or foreclose said mortgages, and that there are no averments that said mortgagors had ever refused to pay said notes, or surrender all of the property conveyed in said mortgages, and that, therefore, it is shown by said bill that the complainants have never, except by their own negligence, been injured by said transfer of said mortgages to them by defendant.

5th. Because the bill, and the exhibits thereto, show that the complainants were not the legal owners of said notes and mortgages, but had, without consent of the defendant, transferred said notes and mortgages to the J. Snow Hardware Company, without recourse on them, before the maturity of said notes and mortgages, thereby placing themselves in the condition in which they could not collect the debts, and that the complainants by said transfer received the full value of said notes and mortgages.

6th. The said bill and exhibits thereto show that long after the maturity of said notes, and the arrival of the law day of the mortgages, the complainants by their own acts, and without the consent of the defendant, re-purchased said notes and mortgages from the J. Snow Hardware Company, which were transferred to them without recourse, and that this transfer to them was made after the complainants learned of the alleged imperfection of title of the mortgagors.

Upon the submission of the cause, upon the demurrers, the chancellor decreed that the same were not well taken, and overruled them. The respondent brings this appeal, and assigns as error the decree of the chancellor.

WOOD & WOOD, and J. J. MAYFIELD, for appellant.—(1.) The bill is without equity, because it seeks to rescind a contract which is wholly executed on both sides.—*Overdeer v. Wiley*, 30 Ala. 709; 1 Story. Eq. Jur., §§ 191-204. (2.) The bill is without equity, because it shows that the complainants ratified and confirmed the said contract after they discovered the alleged fraud.—*Foster v. Gressett*, 29 Ala. 393; *Thompson v. Lee*, 31 Ala. 292; *Griggs v. Woodruff*, 14 Ala. 9; *Kern v. Burnham*, 28 Ala. 428; *Bishop on Contracts*, 683. (3.) Mere averment of fraud in the bill is not sufficient to justify the relief sought. The facts averred were a mere

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expression of opinion.—*Davis v. Betts*, 66 Ala. 206; *Flew-ellen v. Crane*, 58 Ala. 627; *Morgan v. Morgan*, 68 Ala. 80; *McHan v. Ordway*, 76 Ala. 347; *Tabor v. Peters*, 74 Ala. 90; *Penny v. Jackson*, 85 Ala. 67.

FOSTER & JONES, *contra*.

McCLELLAN, J.—The present bill seeks a rescission of a contract made between Maxwell and Sanders of the one part and C. C. Baker, whereby the former conveyed to the latter a certain parcel or lot of land, the consideration being the transfer of three certain mortgages held by Baker to the grantors; and to have Baker decreed to reconvey the land to Maxwell and Sanders, the complainants, upon a re-transfer and surrender of said mortgages to Baker, which they offer to do. The grounds upon which this relief is prayed are laid in the bill to be fraudulent concealments and misrepresentations of Baker as to the property nominally covered by the mortgages and as to the title of the mortgagors to the lands embraced in one of them; and that complainants were induced by such concealments and misrepresentations to convey the lot to respondent and take the mortgages in payment therefor. These averments need not be here stated or discussed in detail. They set forth facts, the particular concealments and misrepresentations relied on, and that complainants were influenced to convey the land by them. They are clearly not the mere conclusions of the pleader. The concealments charged were material, and, if fraudulent, as is directly charged and as is inferable from the facts directly charged, and inducive to the transaction, they are vitiating. The misrepresentations alleged were as to matters of material fact, and not the mere expression of opinion on the part of the defendant. The averments are entirely adequate, if proved, to entitle the complainants to the decree they ask so far as that relief depends upon the fraud of Baker. The demurrers which proceed on the contrary assumption were, therefore, properly overruled.—*Henry v. Allen*, 93 Ala. 197, and cases cited.

2. But other demurrers are in the nature of confessions and avoidance. Conceding the fraud charged and that it conduced to the result complained of, one position advanced by the demurrers is, that no relief can be had on this bill because the contract became and was an wholly *executed* one, in that complainants had made an absolute conveyance of the land to the defendant and the latter had fully paid the agreed consideration by transferring and delivering the

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mortgages to the vendors, reciting in the endorsement of transfer that it was without any recourse whatever on him. The fullest concession of the executed character of the contract will not help the appellant. No contract can ever stand against an assault, seasonably made, on the ground that the fraud of one of the parties induced the other to enter into it, merely because every thing contemplated by it has been fully done. No transaction can be closed against the vitiating consequences of actual fraud leading to its consummation, if the aggrieved party is diligent in his attack upon it. It was long ago decided by this court, in line with the universally prevailing doctrine, that "a misrepresentation by a vendor of land, in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, whether executory or executed," *Foster v. Gressett*, 29 Ala. 393; and there are many cases in our reports where this doctrine has since been acted on without question.

3. The contract having been entered into and the lot conveyed by complainants upon the consideration of a transfer of the mortgages to them, it is immaterial whether the bill negatives the solvency of the mortgagors or not, or whether it avers that the debts purporting to be secured by the instruments were not enforceable aside therefrom. The complainants were entitled to receive precisely what they contracted for—mortgages on the property described in these papers; and if, as alleged in the bill, the mortgages they did receive, though nominally embracing the property, were of no value as to the land because the mortgagor had no title thereto, and of insignificant value as to the personalty because a part thereof was no longer in existence, and other part had been inserted therein by the mortgagee without authority after execution, and by the false representations and concealments charged in the bill against defendant they were led to believe that the title to the realty was good, and that all the personalty was existent and efficaciously covered by the mortgages, and were induced by these fraudulent misrepresentations and concealments to exchange and convey their land for the mortgages, they were entitled to the rescission they seek whether or not the debts mentioned in the instruments could be collected apart from them. Of course, if these debts have been collected by the complainants that would be matter for answer, and would be a complete defense to the bill. But complainants having stipulated for

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the transfer of a debt secured in a particular way, and enforceable by a summary and inexpensive sale under a power, this *security* being the inducement to the contract, it is no answer to their present claim for the defendant to say that, although by my false representations and concealments I have fraudulently induced you to part with your property on a worthless security, when the expressed stipulation was for a security of a particular valuable kind, yet, if you can in the end collect the debt by resorting to other, more expensive and less expeditious remedies than that for which you specially contracted, you must do so; and my fraud is innocuous. Aside from these considerations, we may remark that if this were a good defense at all, it would have to be made by answer since the bill does not disclose that the debt has been or could be made by other process than the foreclosure of the mortgages, and the presumption would be, in the absence of anything to the contrary, that the debts are not collectible apart from the mortgages. And, moreover, it may be further stated here that the bill does aver the insolvency of the makers of two of the three mortgages complainants contracted for, and even were the position of defendant in this connection a sound one, the complainants would still, so far as this question is concerned, be entitled to the relief prayed, notwithstanding the sum recovered by the other mortgage—about one-third of the whole—might be realized by suit on the note.

4. The further contention of the appellant, that the representations made were not such as complainants had a right to rely upon, but that to the contrary it was open to them to ascertain their falsity, and that they were lacking in that diligence which the law required of them in the premises in failing to make the necessary investigation, is without merit. This is manifestly true in regard to the alleged representations as to the personalty, since it does not appear by the bill that complainants had any means of knowing or ascertaining whether they were false or not; and, moreover, these representations were such that complainants had a right to rely upon them unless they knew—not merely had an opportunity of informing themselves—that they were untrue.—*Henry v. Allen*, 93 Ala. 197.

With respect to the alleged false representations as to the title to the land embraced in the mortgage, the same doctrine obtains. The representations alleged, being material and conducing to the transaction, are vitiating notwithstanding the complainants might, by the exercise of diligence, have ascertained their falsity. They were representations of fact

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and not mere expressions of opinion. The defendant assured the complainants as a fact that the mortgagor at the time of executing the instrument had title to the land, and he even went so far as to give them the means and sources of his information—not opinion—to that effect, stating that he, the defendant, had examined the records of land titles and therefrom ascertained the fact to be as he represented it. On this state of case complainants were under no duty to enquire further: they had the right to rely and act on defendant's statements as true notwithstanding the opportunity was afforded them by an examination of public records to ascertain to the contrary.—*Woodbury v. State*, 69 Ala. 242; *Griel v. Lomax*, 94 Ala. 641.

5. It appears from the endorsements on each of the mortgages, all of which are made exhibits to the bill, that soon after they were transferred by Baker to the complainants, the latter for value transferred and assigned them to the J. Snow Hardware Company without recourse, and that several months afterwards said company transferred and assigned them for value and without recourse back to the complainants. It is insisted through the demurrers that these facts are fatal to the relief now sought, for that by the sale for value and transfer of the mortgages to the hardware company the complainants realized all they were entitled to receive out of the mortgages, and hence have not been injured by the original transaction between them and the defendant, and that if the securities are in fact valueless and complainants are damaged in consequence, their loss is not referable to any loss of the defendant, but to their own improvidence in repurchasing the mortgages from their own assignees, a transaction to which the defendant was a stranger and with which he had nothing to do. If the assignment and transfer by complainants to the Hardware Co. was for value and without recourse, and nothing was then said or done by the assignors which, notwithstanding the stipulation against recourse, would entitle the assignees to a rescission of the contract, or render complainants liable to an action of damages, as would be the case, for instance, if the complainants, relying upon, repeated on their own responsibility, the assurances which the defendant gave them in the original transaction, and thereby induced the Hardware Co. to buy the mortgages, if, in short, there was no enforceable legal or equitable obligations resting on the complainants to accept a re-transfer of the mortgage from the Hardware Co., and they did repurchase and accept a re-transfer thereof, they are damnified not by the original

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fraud of Baker—against that they on the case supposed fully recouped themselves by the sale for value to the Hardware Co. — but by their own voluntary act in repurchasing from and paying value to their own transferee. This is the case presented by the bill in its present shape, and upon it the complainants are not entitled to the relief prayed. To give the bill equity in this respect there should be averment of facts which impose an enforceable duty on the complainants to repurchase the mortgages, or a liability on them in damages in respect of the transfer to the company notwithstanding the stipulation against recourse. The demurrer which went to this point should have been sustained.

6. The assignment of the mortgages to the hardware company was such dealing with them, such an affirmance of right to them, on the part of the complainants as would amount to a reaffirmance and ratification of contract between them and the defendant, the conveyance of the lot to the defendant and his transfer of the mortgages to them, and would preclude all relief they might otherwise have been entitled to on account of the alleged fraud of the defendant, *if at the time this transfer was made by them they knew the falsity of the representations and the fact of the fraudulent concealments which are alleged in the bill, but not otherwise.* This knowledge on their part at that time is not alleged in, and is not inferable from the averments of, the bill. Moreover, it does not appear from the bill that complainants had knowledge of the fraud alleged to have been practiced upon them at any time before bill filed. Hence the positions of the demurrant, that the fraud alleged had been condoned and the transaction infected by it ratified, and that complainants have been guilty of laches in the institution of this suit, are all and alike untenable.

For the error pointed out above the decree of the Chancery Court is reversed. The cause is remanded.

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Action on Promissory Note.

1. *Plea of set-off; allegations of conversion by plaintiff* — By a plea averring that the plaintiff was indebted to the defendant for the value of corporate stock belonging to the defendant, "which was sold
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by plaintiff for the use of defendant, and converted to its use, which he offers to set-off against the demand of plaintiff," the defendant ratifies said sale and claims as a set-off the purchase-price of the stock; and is not entitled to recover its actual value.

2. *Stock sold on exchange; agent for seller and buyer.*—The fact that a member of the Stock Exchange, who was employed by the pledgee of the stock to sell it on the Exchange, was also employed by a buyer to purchase, at a limited price, stock of the character offered by the pledgee, does not invalidate the sale effected by such member, if, in accordance with the rules of the Exchange, he procured a fellow member to make the bid, and neither the pledgee nor the purchaser had any knowledge of each other's intentions, or of their instructions to their agent.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This was an action of assumpsit brought by the Birmingham National Bank against R. J. Terry, to recover the amount alleged to be due upon a promissory note; and was commenced on July 27, 1889. This is the second appeal in this case.—93 Ala. 599.

As is stated in the opinion, after the reversal of the cause, the trial was had on issue joined on the plea of set-off. The fourth plea referred to in the opinion, "offers to recoup against the said note the value of said stock, and asks for a judgment against the plaintiff for the difference between the value of said stock with interest thereon and the amount claimed to be due on said note." The note, which is the foundation of the present suit, was executed by the defendant on May 4, 1888, and fell due on June 25, 1888. As collateral security for the indebtedness evidenced by the said note, the defendant deposited with the plaintiff fifty shares of the capital stock of the Edison Electric Illuminating Company. After the maturity of the note, the defendant gave to R. D. Johnston, president of the plaintiff corporation, a power of attorney, authorizing him to sell said stock on the Stock Exchange in the city of Birmingham. After the execution of this power of attorney, the said Johnston employed one Lightfoot, a stock broker, to sell the stock on the Exchange. After this employment by Johnston, said Lightfoot was also employed by one E. W. Rucker to purchase for him at a limited price, some stock of the character of that offered by Johnston. After receiving this order to purchase the said stock, Lightfoot procured one Bradfield, a stock broker, and also a member of the Exchange, to make the bid authorized by Rucker for the stock when offered for sale by Lightfoot on the Exchange. In accordance with this arrangement, Lightfoot offered the stock for sale, and it was bid in by Bradfield. The proceeds of this

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sale were credited upon the note executed by the defendant, Terry, and the amount claimed on said note is the balance due thereon, after deducting this credit and other credits made upon the payment of different amounts by the defendant.

The testimony was in conflict as to whether the sale of this stock on the Stock Exchange was valid. There was some testimony for the defendant tending to show that under the rules of the Stock Exchange it was a fictitious sale.

The testimony for the plaintiff tended to show that neither the plaintiff nor said Johnston knew of the intention of said Rucker to purchase the stock offered for sale, nor of his employment of said Lightfoot to make the purchase, or of the instructions given by Rucker to said Lightfoot; and that the said Rucker did not know of the employment by said Johnston of the said Lightfoot to sell the stock, and that neither the plaintiff nor said Johnston had any interest whatever in the purchase of said stock.

It was shown by the testimony of the defendant himself, that he was present in the Stock Exchange at the time the stock was sold, and was informed of the intention to sell the stock on the day of sale; and that he never made any complaint about the manner in which the stock was sold.

Upon the hearing of all the evidence, at the request of the plaintiff, the court gave the general affirmative charge in its behalf, and to the giving of this charge the defendant duly excepted. There were other exceptions reserved upon the trial of the cause, but it is deemed unnecessary to set them out in detail.

On this appeal, the defendant assigns as error, among other rulings, the giving of the general affirmative charge in favor of the plaintiff.

LANE & WHITE, for the appellant.—The sale of the stock in this case was a conversion by the plaintiff of said stock, and rendered it liable to the defendant for the value thereof. 4 Amer. & Eng. Encyc. of Law, p. 108, § 4, and note; Tyler on Usury, Pawns & Loans, p. 642; *Penny v. State*, 88 Ala. 105; *Thweatt v. Stamps*, 67 Ala. 96. The sale of the stock by Lightfoot, under the circumstances, was a fraud, and did not divest the title of the defendant to said shares. An agent can not, in the same transaction, represent both the buyer and seller.—Beacham on Agency, §§ 66, 67, 68, 643, 789; 1 Amer. & Eng. Encyc. of Law, p. 380, and cases cited in note 1; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494; s. c.

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79 Amer. Dec. 756, *Wassell v. Reardon*, 11 Ark. 705; s. c. 54 Amer. Dec. 245; *Harrison v. McHenry*, 9 Ga. 164; s. c. 52 Amer. Dec. 435.

CABANISS & WEAKLEY, *contra*.—1. Even though the stock was sold by Lightfoot & Co., in the way claimed by the defendant, and such sale was a fictitious sale within the meaning of the rules of the Stock Exchange, such conduct on the part of Lightfoot & Co., did not amount to a conversion of the stock.—*Dufresne v. Hutchinson*, 3 Taunt. 117; *Sargeant v. Blunt*, 16 John. (N. Y.) 73; *Lavery v. Snethen*, 68 N. Y. 526; *Bixel's Case*, 107 Ind. 537; *Ins. Co. v. Dalrymple*, 25 Md. 242, s. c. 89 Amer. Dec. 779; *Lovell v. Fowler*, 11 Amer. St. Rep. 407. 2. But however wrongful may have been the conduct of Lightfoot & Co., in selling the stock as they did, the plaintiff was not responsible for the same. Where an agent is authorized to employ an ancillary agent, such ancillary agent becomes individually liable to the principal, and the primary agent is liable only for *culpa in eligendo*.—Commentaries on Agents & Agencies, (Wharton), §§ 277, 238, 601; 1 Amer. & Eng. Encyc. of Law, pp. 394, 407, n. 2; *Darling v. Stanwood*, 96 Mass. 507; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *University of Mich. v. Rose*, 45 Mich. 284; *Hilliard v. Richardson*, 63 Amer. Dec. 743; *Mayor v. McCary*, 84 Ala. 472; *Campbell v. Reeves*, 3 Head (Tenn.), 226. 3. The defendant, not having the legal title to the stock, could not maintain trover for the conversion of same, nor plead such conversion as a set-off to this action.—*Nabring v. Bank of Mobile*, 58 Ala. 204; *Halliday v. Holgate*. L. R. 3 Ex. 299; *Johnson v. Stear*, 15 C. B., N. S. 330; Colbrooke on Collateral Securities, § 344.

COLEMAN, J.—The Birmingham National Bank sued appellant Terry upon his promissory note. The record shows that "the defendant withdraws all pleas, except the plea of set-off, and the case tried on issue joined on the plea of set-off." It would require a palpable disregard of this plain record entry were we to consider questions which might have legally arisen under other pleas, and which were not before the court. There was only one plea, and that was the plea of set-off, upon which issue was joined. Plea No. 2 reads as follows: "The defendant, as a defense to the action of the plaintiff, sayeth that, at the time said action was commenced, the plaintiff was indebted to him in the sum of five thousand dollars, for the value of fifty shares of the capital stock of The Edison Electric Illuminating Company, the

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property of the defendant, which were sold by the plaintiff for the use of the defendant on or about the 8th day of December, 1888, and converted to its use, which he hereby offers to set-off against the demand of the plaintiff, and he claims judgment for the excess." This plea distinctly states the shares were "sold by the plaintiff for the use of the defendant," and although these words in the latter part of the plea are followed by the averment, "and converted to its use," the latter phrase, in the connection used, must be held to mean a conversion of the proceeds of the sale, rather than such wrongful conversion of the stock itself, as to authorize proof of damages resulting to the defendant by the sale. As framed, the defendant, by this plea, ratified the sale, and claimed, as a set-off the purchase price of the stock. The evidence is uncontradicted that the plaintiff credited the note with the purchase money received for the stock, and in his suit on defendant's note, only claimed the balance unpaid.

Were we to consider the case as tried on plea No. 4, and regard that plea in the nature of a claim for damages, under the facts, the measure of recovery would be the difference between the price for which the stock sold, and its actual value when sold. And we have been unable to find any evidence, which would authorize a conclusion, that the stock did not bring its fair value on the day of sale. There is no evidence to show that there was any collusion or fraud or agreement between R. D. Johnston, representing the Bank, and the purchaser of the stock in regard to its sale or purchase. In fact the contrary is abundantly proven. Terry, who was a member of the Stock Exchange, by his power of attorney, directed that this stock be sold upon the Exchange. He was notified that it was going to be sold, was present when it was offered for sale, and knocked down to the purchaser. He knew the rules of the Stock Exchange, knew that the seller would be required to conform to its rules, and that a sale, made in accordance with them, would be a valid sale. There was no objection by him, at the time, that he had not had sufficient notice, nor did he object on account of the price bid. The subsequent advance in the market value of stock sold on exchange doubtless is a fruitful source of regret to sellers, who deal in stocks on exchange, but, in the absence of fraud, the advance in price can give no cause of action to the loser.

The principle of law that the same person can not be both buyer and seller has no application to the facts of the case. R. D. Johnston employed Lightfoot, a member of the Stock Exchange, to sell this stock. One E. W. Rucker, the pur-

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chaser, employed Lightfoot to purchase on the exchange, at a limited price, stock of the character offered by Johnston. Johnston knew nothing of Rucker's engagement or intentions. In accordance with the rules of the exchange, Lightfoot secured the services of Bradfield, another member of the exchange, to bid the price fixed by Rucker. Lightfoot knew the instructions of both Johnston and Rucker, but neither Johnston nor Rucker had any knowledge of each other's intentions, or their instructions to Lightfoot. And as we have stated, there is no evidence to show, that the rules of the Stock Exchange, which were known to Terry, were not observed, or that the stock did not bring its fair market value, which was credited upon the note of the defendant.

Under any view we take of the case, the plaintiff was entitled to the general charge upon all the evidence, and it is unnecessary to consider special exceptions to the rulings of the court.

Affirmed.

Oxanna Building Association v. Agee.

Action on Promissory Note.

1. *Action against a corporation; judgment by default; proof of service of process.*—To authorize the rendition of a judgment by default against a corporation, the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service, such an officer or agent of the defendant, as was, by law, authorized to receive service of process for, and on behalf of the defendant.

APPEAL from Anniston City Court.

Tried before the Hon. B. F. CASSADY.

This was an action brought by A. P. Agee, as receiver of the Anniston Savings & Deposit Company, against the Oxanna Building Association; and counted upon several promissory notes.

The transcript contains no bill of exceptions; and the judgment entry, so far as it bears upon the decision rendered in this court, is sufficiently stated in the opinion. The appellants assign as error, among other grounds, that the record does not show that proof was made to the court that

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W. S. Larned, at the time of service upon him as the secretary and treasurer, was such secretary and treasurer of the defendant company.

SAVAGE & COLEMAN, for appellant, cited *Manhattan Ins. Co. v. Fowler*, 76 Ala. 372; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *M. & E. Railroad Company v. Hartwell*, 43 Ala. 508; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Southern Express Co. v. Carroll*, 42 Ala. 437; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667; *W. & C. R. R. Co. v. Cole*, 6 Ala. 655; *Lyon v. Lorant*, 3 Ala. 151; *Bank of Huntsville, v. Walker*, Minor, 391; 1 Black on Judgments, § 81.

BLACKWELL & KEITH, *contra*.

HEAD, J.—This is a suit against the Oxanna Building Association, alleged to be a private corporation. The sheriff's return of the summons and complaint shows execution by leaving a copy thereof with "W. S. Larned, Secretary and Treasurer of defendant, The Oxanna Building Association." The court rendered judgment by default against the defendant. The only proof taken by the court in reference to the service, is shown by the following recital in the judgment-entry: "Came the plaintiff by attorney, and the service having been proven on W. S. Larned, as secretary and treasurer of the defendant."

To authorize the rendition of judgment by default against a corporation, the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service, such an officer or agent of the defendant, as, by law, was authorized to receive service of process for and on behalf of the defendant.—*Manhattan Fire Ins. Co. v. Fowler*, 76 Ala. 372, and authorities there cited. The proof made in this case falls far short of this requirement. It proves nothing but the fact of the service itself, which was already shown by the sheriff's return. The judgment was, therefore, unauthorized.

Reversed and remanded.

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Kyle v. Swem.*Statutory Action of Detinue.*

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1. *Landlord's lien for rent; superior to subsequent mortgage.*—A landlord's lien for rent of a store-house attaches to property immediately upon its being brought into the rented premises, and is superior to the lien of a mortgage subsequently executed on the same property.

2. *Detinue; possession in defendant necessary to maintain action.*—To maintain an action of detinue, it must be shown that the defendant, at the time the writ was sued out, had the actual possession or controlling power over the property, and the plaintiff is not entitled to recover if it should appear that the defendant was in possession of the property sued for as the bailee of the sheriff, who had levied a writ of attachment upon such property.

3. *Lien of attachment; not affected by replevy bond.*—The levy of an attachment upon personal property creates a lien and places the property in the custody of the law; and the execution of a replevy bond by defendant in a detinue suit, who is in possession as the bailee of the sheriff, under a writ of attachment previously levied on the property sued for, neither terminates the lien, nor terminates the bailment so as to estop the defendant from denying his possession.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This was a statutory action of detinue, brought by the appellant, J. C. Kyle, against the appellee, J. C. Swem, on December 9, 1889, to recover certain personal property, alleged to be in the possession of the defendant. By special plea the defendant set up as a defense the facts shown in the opinion. To this plea the plaintiff demurred, on the grounds: 1st. That by said special plea the defendant seeks to set up a superior title under a third person, which title was created by the act of the defendant himself. 2d. That the defendant sets up in said plea a lawful act and interference of a third person to defeat plaintiff's title to said property. 3d. That the defendant attempts to show in said plea that by his own contract with another party other than the plaintiff, he has placed the property sued for beyond his own control, and the control of the plaintiff. This demurrer was overruled, and the plaintiff, in his replication to said plea, averred, 1st, that at the time of suing out the summons and complaint in this cause, the defendant was in possession of the property sued for; and 2d, that the defendant, on December 17, 1889, executed a replevy bond in

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this suit, wherein it was recited that after the execution of the writ of detinue, the defendant obtained possession of said property, upon entering into said bond, and that, therefore, the defendant is estopped from denying his possession of said property, at the time of the levy of the writ of detinue. To this replication the defendant filed his rejoinder, wherein he averred that on December 17, 1889, the date of the execution of the replevy bond, he, the defendant, was in possession of said property as the bailee of the sheriff, subject to his orders and control, and "that said sheriff held the same under said levy made under said writ, as fully shown in defendant's plea." To this rejoinder the plaintiff demurred, on the grounds, 1st, that when taken in connection with the pleas filed, the rejoinder shows that the possession as bailee of the sheriff was caused by defendant's own acts and defaults. 2d That the pleadings show the sheriff executed the writ of detinue, and then delivered the property to defendant as defendant, by virtue of the detinue bond, and that, thereupon, the bailment set up in said rejoinder was at an end. This demurrer to the rejoinder was overruled, and issue was joined upon the pleadings.

The facts as shown by the bill of exceptions are fully stated in the opinion. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, judgment was rendered for the defendant. Plaintiff appeals, and assigns as error the rulings of the court upon the pleadings, and the judgment rendered.

GARRETT & UNDERWOOD and HANSON & BUCK, for appellant.

1. The court erred in overruling the demurrer filed by appellant to the rejoinder of the appellee.—*Abbett v. Page*, 92 Ala. 571; *Hill v. Nelms*, 86 Ala. 442; *Roswald & Stoll v. Hobbie & Teague*, 85 Ala. 73; *Caldwell v. Smith*, 77 Ala. 157.
2. The appellee was estopped from setting up the fact that he held said property as the bailee of the sheriff, by reason of his having executed a replevy bond.—*Abbett v. Page*, 92 Ala. 571; *Hill v. Nelms*, 86 Ala. 442; *Roswald & Stoll v. Hobbie & Teague*, 85 Ala. 73; *Caldwell v. Smith*, 77 Ala. 157; *Miller v. Hampton*, 37 Ala. 349; *Wallis v. Long*, 16 Ala. 738; *Mitchell v. Ingram*, 38 Ala. 395.
3. The outstanding title, which the defendant set up by reason of the attachment sued out, did not give a prior lien, because the contract of lease was made with one W. C. Denson, and not with Ettie W. Denson, at whose suit the writ of attachment was issued.—Code of 1886, § 3069; *Drakford v. Turk*, 75 Ala. 339; *Tucker v. Adams*, 52 Ala. 254.

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WARD & JOHN, *contra*.—The defendant in the court below did not have such possession of the personalty as would enable plaintiff to maintain detinue.—*Walker v. Fenner*, 20 Ala. 192-198; *McArthur v. Carrie, Admr.*, 32 Ala. 75-81. The landlord's lien attached as soon as the goods were put in the rented house, and prevailed over the rights of the plaintiff, acquired under his subsequently executed mortgage.—*Abraham v. Nicrosi*, 87 Ala. 173.

HARALSON, J.—The facts in this case, as set out in the bill of exceptions, are stated to be without any conflict.

The defendant, Swem, leased a house in Birmingham, with store below and rooms above, for the term of one year, from the 4th of September, 1888, from W. C. Denson, the agent and husband of Mrs. Ettie W. Denson, who was the owner of the house and premises, and of the rent due under the lease; and defendant, under the lease, went into the immediate possession and occupancy of the lease-hold, and carried with him and placed in the store and rooms the personal property the subject of this suit. Before the expiration of the lease, it was extended another year, the defendant continuing, as he had from the first, in the open possession and occupancy of the premises, with said personal property in and upon it, until December 12, 1889.

Swem failed to pay rent, and Mrs. Denson, sued out an attachment in the Circuit Court of Jefferson county, to enforce the collection of her rents, which attachment, coming to the hands of the sheriff, was, on the 12th December, 1889, levied by him on the personal property which was on the premises, and which is sued for here. He constituted and appointed the defendant his special agent and bailee, to hold and keep said property for him, until he should call for the same.

The plaintiff, Kyle, held a mortgage on this property—levied on by the sheriff under said attachment of Mrs. Denson—which mortgage was made by defendant to him on the 10th April, 1889, after the relation of landlord and tenant had been established between the defendant and Mrs. Denson, and while the property included in the mortgage was in and upon the rented premises.

The plaintiff, on the 9th of December, 1889, after the maturity of his debt and mortgage, commenced this suit in detinue against defendant, in the Circuit Court of Jefferson county, to recover the possession of said property. The summons and complaint were placed in the hands of the sheriff on the 14th of December, and he appears, on the

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17th of December, to have seized thereunder the property already attached and left by him on the leased premises in the possession of the defendant, as his agent and bailee; and, on the 18th of that month, the defendant gave to the sheriff a detinue or forthcoming bond for the property, and it was left in the possession of the defendant, as it had continuously been, since the levy of said attachment on it.

The attachment suit of Mrs. Denson, was prosecuted in said Circuit Court, and judgment was rendered in it on the 24th of March, 1890, for \$541.75, which included \$72.50, rent for a month of the first year's renting. The judgment condemned said property for sale, to satisfy said rent claim of Mrs. Denson, and the sheriff took possession of the same from the defendant and sold it, and applied the net proceeds to the payment of said judgment.

The defendant pleaded the general issue, payment, usury in the mortgage debt, and a special plea, setting up most of the facts detailed above. To this plea, the plaintiff demurred, and the demurrer being overruled, he replied, to which replication the defendant rejoined, to which rejoinder the plaintiff demurred, which being overruled, he took issue, all of which will appear at large, in the record of the cause. The rulings of the court on the pleadings were free from error, as will appear in what follows.

The bill of exceptions shows that all of the facts set up in said special plea and in said rejoinder were proved, without any conflict in the evidence.

The agreement by which the rent accrued to Mrs. Denson, as has been above shown, was entered into by the defendant, and he took possession of the rented premises, and placed said property thereon, before he gave said mortgage on the property to the plaintiff. Under these circumstances, Mrs. Denson's lien for rent on the personal property was superior to that of the plaintiff on the same property.—*Union Warehouse & El. Co. v. McIntyre*, 84 Ala. 78. Her lien for rent attached to the property the moment it was brought into the rented store-house and rooms, and a mortgage on it, executed after this time, could convey no rights as against her claim and right for rent, for the term of the lease, so long as the property remained on the rented premises.—*Abraham v. Nicrosi*, 87 Ala. 173.

In order to recover, it was necessary for the plaintiff to show, that the defendant was in the possession of the property sued for, at the time of the suing out of the summons and complaint—which appears to have been the only demand made for the possession—unless it should appear that,

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having the possession, he held it under a contract of bailment, the terms of which he would violate by failing to redeliver it.—*Walker v. Fenner*, 20 Ala. 198; *McArthur v. Carrie*, 32 Ala. 75; *Henderson v. Felts*, 58 Ala. 593.

The contention of the plaintiff, however, is that if defendant did possess and hold the property as bailee of the sheriff, at the date of the suit, and the alleged seizure of it under the detinue writ, the giving of the detinue bond by him terminates the bailment, and estops him to deny his possession. But we can not sustain this position, for it is well settled, that the levy of an ordinary attachment on personal property, itself creates a lien, and places the property levied on, in the custody of the law, and that the execution of a replevy bond by the defendant can not impair or destroy the lien. It is an inexpensive method of preserving the property until it is wanted for the payment of the judgment that may be rendered, and until the bond is forfeited, the property remains in the custody of the law, and the lien is unimpaired.—*Cordaman v. Malone*, 63 Ala. 556; *Scarborough v. Malone*, 67 Ala. 570; *Striplin & Co. v. Cooper & Son*, 80 Ala. 256.

When the sheriff levied Mrs. Denson's attachment to enforce her lien, and took the property into his possession, from that moment it was *in gremio legis*, and his alleged seizure of it afterwards—which was merely formal, to seem to comply with the law—and the giving of said detinue or forthcoming bond by defendant did not and could not have the effect to impair or destroy the rent lien; nor can it be said, that the defendant, and not the sheriff, was in the possession of, and had the controlling power over the property. Defendant's possession was that of his bailor, the sheriff; and, accordingly, as the evidence shows, at the end of the attachment suit of Mrs. Denson, when the property was ordered to be sold by the court, the sheriff took it—kept by his bailee, the defendant, till this time for this purpose—and sold it, and applied the proceeds to the satisfaction of the judgment in attachment.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Windham v. National Fertilizer Co.

Action on Promissory Note.

1. *Judgment by default, without service of process.*—In an action against several defendants, one of whom is not served with process, it is error to render judgment by default against all of the defendants, and such judgment will be reversed.

2. *Same; effect of such reversal.*—The only effect of such reversal is to strike from the judgment the name of the defendant not entered, it being operative as to the others.

APPEAL from Circuit Court of Geneva.

Tried before the Hon. J. M. CARMICHAEL.

This was an action of assumpsit, brought by the appellee, the National Fertilizer Co., against the appellants; and counted on a promissory note, alleged to have been signed by all the defendants. The return of the sheriff showed that the summons and complaint had been served upon all of the defendants, except Z. McKinney. A judgment by default was rendered against *all* of the defendants; and this appeal is prosecuted from said judgment, and the same is here assigned as error.

ROBERTS & MARTIN, for appellant.

M. E. MILLIGAN, *contra*.

STONE, C. J.—The return of the sheriff in this case shows that service of the summons and complaint was perfected on all the defendants except one, Z. McKinney. As to him the process was returned “not found.” Judgment by default was taken and entered up against all the defendants. This was error which compels a reversal of the judgment.—*Smith v. Winthrop*, Minor, 425; *Driver v Spence*, 3 Ala. 98; *Granberry v. Welborn*, 4 Ala. 18; *Faver v. Briggs*, 18 Ala. 478; *Childress v. Taylor*, 33 Ala. 185; *Parker v. Parker*, 39 Ala. 347. But as the cause of action sued on is several as well as joint, reversing the judgment as to McKinney does not impair or affect it as to the other defendants who were served with the summons. The only effect of this reversal is to strike his name from the list of defendants against

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whom judgment was entered, and leave it operative against the others.—*Lucy v. Beck*, 5 Porter 166.

Reversed in part, but not remanded.

The clerk will certify this opinion and the judgment to the Circuit Court.

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Action for Damages for Personal Injuries.

1. *Plea of the general issue; admissions thereunder by a corporation formed by consolidation.*—In an action for personal injuries against a corporation, on the theory that it assumed the liability of a negligent corporation, which consolidated with others to form the defendant, after the injuries were received, and before the institution of the suit, the plea of the general issue admits the defendant's corporate character, but does not admit that the defendant derived its existence from the consolidation of the negligent company with other corporations.

2. *Action against a corporation; evidence of consolidation.*—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to prove that the negligent corporation had been merged into the defendant.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

This action was brought by the appellant, Hattie O. Zealy, against the Birmingham Railway & Electric Company, on August 2, 1890, to recover damages for personal injuries, alleged to have been sustained by the plaintiff by reason of the negligence of the Birmingham Union Railway Company, or its employes. Each of the counts of the complaint, as amended, averred that "the plaintiff claims of the defendant, a corporation organized under the laws of Alabama, by the consolidation on, to wit, the 5th day of May, 1890, with

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the Birmingham Union Railway Company, the Birmingham & Bessemer Railroad Company, the Ensley Railway and the Birmingham & Electric Company, private corporations existing under the laws of the State of Alabama." The closing averment of each count was as follows: "And the plaintiff avers that by reason of said consolidation the defendant is liable to her in damages for the injuries caused by the wrongful acts of the said Birmingham Union Railway Company, hereinabove complained of." Issue was joined upon the pleas of the general issue.

On the trial of the cause, it was shown that the injuries were sustained by the plaintiff on April 27, 1890, while she was a passenger on one of the horse cars operated by the Birmingham Union Railway Company. The evidence, introduced for the purpose of proving the consolidation of the Birmingham Union Railway Company with other corporations to form the defendant corporation, is sufficiently stated in the opinion. Upon the hearing of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its behalf; and to the giving of this charge the plaintiff duly excepted. There were other rulings of the court to which exceptions were reserved, but it is not deemed necessary to set them out. There was judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court.

JAMES H. LITTLE, for appellant.—The averment in the complaint that the defendant is a corporation under the laws of Alabama, by the consolidation of other corporations existing under the laws of Alabama, is a mere allegation that it is a body corporate, and plaintiff is not required to prove such allegation under the general issue.—2 Morawetz on Corporations, § 944; *Shields v. Ohio*, 95 U. S. 323; *R. R. Co. v. Maine*, 96 U. S. 509; 4 Amer. & Eng. Encyc. of Law, p. 272. The appearance of the defendant is an admission of the corporate character as averred.—*Oxford Iron Co. v. Spradley*, 46 Ala. 98. The defendant is estopped to deny the consolidation.—*Railway Co. v. Skidmore*, 69 Ill. 563. Both companies were liable and it was not necessary to prove consolidation.—*Ricketts v. B. St. R. R. Co.*, 85 Ala. 600; 2 Morawetz on Corporations, § 955; *Warren v. M. & M. R. R. Co.*, 49 Ala. 584.

HEWITT, WALKER & PORTER, *contra*.—The recitals in the act of the General Assembly and the deed introduced in evidence were no proof of the fact of consolidation.—*Kelly* Vol. xlix.

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v. Trustees of A. & C. R. R. Co., 58 Ala. 489; 1 Greenl. on Ev., §§ 491, 500.

MCCLELLAN, J.—This action is for personal injuries resulting to the plaintiff, Hattie O. Zealy, for negligence on the part of The Birmingham Union Railway Company, or its employes. The suit is against the Birmingham Railway and Electric Company, on the theory that after the injuries were received, and before the institution of the suit, the negligent corporation was, with several other corporations, consolidated, forming the defendant corporation, which latter concern thereby assumed the liability now sought to be enforced, though primarily it rested solely, of course, on the Birmingham Union Railway Co. The complaint is to be taken as averring these facts, though they appear therein more in the way of casual recital than affirmative and direct allegation. It was necessary, obviously, for the complaint to aver them, since without the fact of consolidation before suit brought no cause of action existed when the suit was brought, and no recovery could be had. Several pleas were filed by the defendant, each of which presented only the general issue of not guilty, and upon this issue the case was tried. It is insisted that the submission of the cause on this issue alone was an admission on the part of the defendant both of the capacity in which it was sued and of its responsibility for the wrongs charged against the Union Railway Co.; or, in other words, that neither defendant's corporate character nor the fact of the merger of the wrong-doing corporation by consolidation into the defendant corporation is within the general issue. As to the first proposition the contention is sound; the plea of not guilty admits the capacity in which defendant is sued. But from the fact that defendant is a corporation it does not follow that it came into existence as such as a result of the consolidation of the Birmingham Union Railway Co. with other corporations. While the pleas interposed are not to be taken as denying the capacity in which the defendant is sued, they do go in traverse of every fact alleged in the complaint which is essential to the existence and enforcement of the claim advanced, so far as the misconduct charged against the Union Railway Co. and defendant's responsible connection therewith are concerned. As has been said by this court, "this form of defense goes . . . in traverse of the misconduct, resulting in injury, which [or liability for which] the complaint imputes to the defendants, the facts out of which the liability arises."—*Louisville & Nashville*

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R. R. Co. v. Trammell, 93 Ala. 550. The complaint shows that the defendant corporation did not commit the wrongs counted on. Had it simply averred these wrongs as being committed by another corporation, the consequent injury, and that defendant was a corporation, it clearly would have presented no cause of action against the party sued. That party's liability for the wrongs of the negligent corporation arose, if at all, from the fact that it succeeded by process of consolidation to the assets and liabilities of the wrong-doing company. And the fact of such consolidation was necessary to be alleged, was denied by the plea of the general issue, and of consequence was necessary to be proved by the plaintiff.

The trial court held that there was no evidence adduced which tended to prove that the Birmingham Union Railway Co. had been merged into the defendant corporation before suit brought, and upon this theory gave the affirmative charge for the defendant.

The record leaves no room for doubt that the defendant company became a corporation, by the name of the Birmingham Railway and Electric Company, at some time prior to the act of February 12, 1891, by and through a consolidation of several then existing corporations, one of which was the Birmingham Union Railway Company, which in April, 1890, inflicted the injuries complained of. This fully appears by an act approved February 12, 1891, entitled "An act to confirm, amend and enlarge the charter of Birmingham Railway and Electric Company, and to ratify and confirm the consolidation of the Bessemer and Birmingham Railroad Company with other corporations therein named," which, after reciting that under and by virtue of the provisions of section 13 of "an act to confirm, amend and enlarge the charter of the Bessemer Dummy Line, and to change the name thereof," approved February 19, 1889, the Bessemer and Birmingham Railroad Company has united and consolidated its railroads and franchises, rights and privileges with the railroads, franchises, rights and privileges of the Birmingham Union Railway Company, the Ensley Railway and of the Birmingham Electric Company, corporations organized under the general laws of the State, that by such consolidation and amalgamation, "the said four corporations did form one general corporation, under the name and style of 'Birmingham Railway and Electric Company,' " and further, setting forth the terms of said consolidation and the manner in which it was effected, &c., &c., proceeds to ratify and confirm the same in all respects, and

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to provide "that all the rights, powers and franchises, at the time of such consolidation, belonging to each and all of said corporations, so consolidating, and their rights and interest in and to every species of property, are by virtue of said consolidation, declared to be transferred to and vested in the Birmingham Railway and Electric Company, without any other deed or transfer," &c., with a *proviso* that "all the debts, liabilities, and duties of each and all the said consolidating corporations, shall attach to said consolidated company, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it." Acts 1890-91, pp. 584-7. This statute was adduced in evidence. So also was a deed, executed by the Birmingham Union Railway Company to the Birmingham Railway and Electric Company on September 30th, 1890, which recites the consolidation referred to in the act, and the creation thereby of the last named corporation at some time, not specified, prior to its date, and in terms conveys to the consolidated company all the rights, privileges, franchises and property of the grantor, and among other property the line of street railway upon which the plaintiff was injured. This, the act of the General Assembly and the deed, was unquestionably evidence that the defendant became a corporation under and by the name of the Birmingham Railway and Electric Company by consolidation between the Birmingham Union Railway Company and the other named corporations prior to Sept. 30th, 1890. The fact of incorporation,—in other words the manner in which it was effected,—the name of the consolidated company, and its responsibility for the wrongs of the consolidating companies is shown by this evidence. What this evidence does not show is the precise date at which the consolidation took place, nor whether it was prior or subsequent to August 2d, 1890, when this suit was instituted. But while the plea of the general issue does not admit the responsibility of the defendant for the negligence of the Birmingham Union Railway Company, and does not of itself admit that the defendant corporation was the result of a consolidation between that particular company and others, it does admit that on August 2d, 1890, when the suit was brought, the defendant was a corporation by the name and style of the Birmingham Railway and Electric Company. And the confirmatory statute and the deed we here referred to go to show that it became such corporation by the consolidation of the negligent corporation with others; and the admission of the plea, with the

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facts thus shown, taken together,—the one as showing that the defendant existed as a corporation by this name prior to suit brought, the other as showing that this corporate existence and name was acquired by this consolidation,—clearly, in our opinion, constituted competent evidence of the alleged consolidation prior to the institution of the suit. The trial court erred, therefore, in giving the general affirmative charge for the defendant on the assumption of the non-existence of such evidence.

The other questions urged upon our attention need not arise on another trial, and we will not pass upon them.

Reversed and remanded.

McCalley v. Otey.

Bill in Equity to enjoin Sale under Power in a Mortgage; and to redeem.

1. *Equity jurisdiction; injunction of sale under the power contained in a mortgage.*—A court of equity will enjoin a sale under the power in a mortgage, when the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose; as where, having refused repeated tenders, he files a bill to foreclose, dismisses it without prejudice when the cause was ready for hearing, and advertises the land for sale under the power in the mortgage, with the avowed purpose of compelling the payment of another claim, which is disputed.

2. *Tender; effect of.*—A tender of the entire amount due, including interest, at any time between the maturity of the debt and the commencement of suit, stops the interest, and discharges the debtor from the costs of a subsequent suit.

3. *Same; when actual proffer of money is dispensed with.*—The actual proffer of money tendered is dispensed with, when the debtor, ready and willing to pay, is about to produce it, but is prevented by the creditor declaring he will not receive it.

4. *Payment of money into court not a prerequisite of a bill to redeem and to enjoin the execution of a power of sale.*—The payment of money into court is not essential to the equity of a bill filed by the mortgagor to redeem and to enjoin the execution of a power of sale, when the bill alleges a tender, several times repeated, and its refusal, and that the complainants "are now ready and willing to pay, and have been ready and willing to pay ever since" the tender.

5. *Tender; when sufficient to stop payment of interest.*—To avoid the payment of interest after tender, the debtor must tender the exact amount due, and he must keep that amount ready at all times to be paid to the creditor upon his demand, if he should conclude to receive it.

6. *Same; burden of proof.*—When the tender is denied, the burden of proving that the amount tendered was kept at all times in readiness.

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ness to be paid upon the demand of the creditor, is upon him who pleads the tender. (Stone, C. J. dissenting.)

APPEAL from the Chancery Court of Madison.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed on July 19, 1889, by Mrs. Octavia A. Otey and her children, against Charles S. McCalley and others; and sought to have a threatened sale of land, under a power contained in a mortgage, enjoined, and to be allowed to redeem said property from under the mortgage. The mortgage was executed on August 6, 1876, by Mrs. Octavia A. Otey, and was given to secure the payment of money borrowed by her from a Miss Ford, who afterwards married W. J. McCalley. Having survived her husband, Mrs. McCalley, *nee* Ford, devised and bequeathed all of her property, including the note and mortgage executed by Mrs. Otey, to Miss Martha T. Russell. The money was borrowed by Mrs. Otey at an usurious rate of interest; the interest was paid annually until September 1, 1884, when, upon a statement made between the parties, it was ascertained that the balance due upon said mortgage was \$1,480.76. Upon Miss Russell agreeing to accept \$1,200 in full satisfaction and discharge of the debt, Mrs. Otey applied to Charles S. McCalley to advance this amount for her and have the mortgage assigned to him as security. Charles S. McCalley agreed to do this, and by the terms of the agreement, evidenced by letters exchanged between him and Mrs. Otey, the latter agreed to pay him annually the legal interest on \$1,480.76 as the amount due until January 1, 1888; and he was then to surrender the mortgage to her on payment of \$1,200. The bill alleged the punctual payment of interest to said Charles S. McCalley as stipulated up to December 31, 1887; that on that day John M. Hampton, for her, tendered to said McCalley \$1,318.46, which was the \$1,200 agreed to be accepted by McCalley on January 1, 1888, together with the interest on \$1,480.76 for one year; that McCalley refused to accept the tender thus made, and also refused to accept a like tender made by the said Hampton, for her, on January 2, 1888, and in July, 1889, before the filing of the present bill. It was also alleged in the said bill that on July 2, 1888, the said Charles S. McCalley filed his bill in the Chancery Court against Octavia A. Otey, to foreclose the said mortgage; that the defendant filed answers to said bill, proof was taken by the parties to the cause, and the same was ready for hearing; but that at the March term of the Chancery Court of Madison County the said Charles S.

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McCalley dismissed his bill without prejudice, and advertised the lands conveyed in said mortgage, for sale, under the power contained therein, on July 22, 1889.

The complainants also alleged that the said proposed sale of land on July 22, 1889, "was not for the *bona fide* purpose of collecting the debt secured by said mortgage, but for the purpose of coercing the payment of another claim of debt against said Octavia A. Otey of several hundred dollars, which she never contracted," and which she is not liable to pay.

The prayer of the bill is, that the said Charles S. McCalley be enjoined and restrained from selling the said lands under the power of sale contained in the mortgage; that he be required to accept said sum, \$1,318.46, "which complainants are now ready and willing to pay him, and have been ready and willing to pay him ever since December 31, 1887, in redemption of said mortgage, and for payment and satisfaction of said debt secured by it."

On January 6, 1890, the respondent, Charles S. McCalley, filed his answer to said bill of complaint, and among other things, denied therein, that there had ever been a sufficient tender made by Mrs. Otey of the amount due upon the mortgage debt; and alleged that the attempted tender made by said Hampton was made for his own benefit under a contract of purchase of certain lands contained in the mortgage from Mrs. Otey, in which he agreed to pay the annual interest, and to pay the mortgage debt on January 1, 1888; and further alleged that the result of accepting the payment from said Hampton and the transfer of the mortgage to him, would be to defeat the collection of the debt due to said Charles S. McCalley from Mrs. Otey, which was not secured by the mortgage; that the said McCalley was unwilling to do this, unless the said Hampton agreed to pay the non-secured debt of Mrs. Otey to respondent.

On March 21, 1890, the complainants amended their bill by averring that they were "ready and willing to pay said McCalley the said sum of \$1,318.46 so tendered him as aforesaid, and have been ready and willing to pay the said sum to him ever since the 31st of December, 1887, and now bring the same into court and deposit it with the register to abide the order and decree of the court."

The testimony, as shown by the depositions taken in behalf of the complainants, was to the effect that on December 31, 1887, the said J. M. Hampton tendered to the said Charles S. McCalley the amount of \$1,318.46; that this tender was refused, and that said Hampton repeated the tender

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on January 2, 1888, and about the 1st of July, 1889, shortly before the filing of the bill in this case, and that each of these tenders was refused. The testimony, as shown by the depositions of the said McCalley, substantiated the allegations of his answer.

On the final submission of the cause, upon the pleadings and proof, the chancellor decreed that, "it appearing to the court from the pleadings and evidence, that the money tendered was at all times ready to be paid when the defendant McCalley would receive it, the court is of the opinion that no interest should be charged;" and further decreed that the sum of \$1,318.46 paid into court be declared the property of the said Charles S. McCalley, and that he receive the same in full satisfaction of the debt and mortgage, and that the temporary injunction be made perpetual. This appeal is prosecuted by the said Charles S. McCalley, and the final decree of the chancellor is here assigned as error.

R. C. BRICKELL and LAWRENCE COOPER, for appellants.—A court of equity will restrain the execution under a power of sale in a mortgage, only when, by clear and precise allegations of facts, it is shown that the sale is against good conscience and will work irreparable injury.—*Vaughan v. Marable*, 64 Ala. 60; *Security Loan Asso. v. Lake*, 69 Ala. 456; *Glover v. Hembree*, 82 Ala. 324; 2 Jones on Mortg., § 1801, *et seq.*; 1 High on Inj., § 443, *et seq.*; *Daughdrill v. Sweeny*, 41 Ala. 310. If the mortgage debt is admitted to be due, there must be payment or the bill must tender and bring into court the amount admitted to be due.—*Daughdrill v. Sweeny*, 41 Ala. 310; 2 Jones on Mortg., § 443. The tender, to be available, must conform to the requisites of a court of law. It must be a tender of the whole amount due.—*Smith v. Anders*, 21 Ala. 782; *Daughdrill v. Sweeny*, 41 Ala. 310; *Shields v. Lozear*, 22 N. J. Eq. 447; *Becker v. Boon*, 61 N. Y. 317. 7 Wait's Act. & Def., 590. Where a bill alleges a tender previous to the filing thereof, to render the prior tender available to avoid the payment of interest thereafter, it must be shown that the tender has been kept good; was always ready to be surrendered to the creditor upon his demand.—*Rose v. Brown*, 1 Am. Dec. 22; *Moynahan v. Moore*, 77 Am. Dec. 468; *Crain v. McGoon*, 29 Am. Rep. 37; *Tompkins v. Batie*, 38 Am. Rep. 361; *Shields v. Lozear*, 22 N. J. Eq. 447; *Aulger v. Clay*, 109 Ill. 487; *Tuthill v. Morris*, 81 N. Y. 94; *Alexander v. Caldwell*, 61 Ala. 543; *Park v. Wiley*, 67 Ala. 310; *Frank v. Pickens*, 69 Ala. 369.

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TRANCRED BETTS, *contra*.—A court of equity should enjoin a sale under the power contained in a mortgage when the facts and circumstances are such as shown in the present case.—*Struve v. Childs*, 63 Ala. 473; *McCalley v. Otey*, 90 Ala. 302. The tender in the present case was sufficient to avoid the payment of interest after December 31, 1887.—*McCalley v. Otey*, 90 Ala. 302; *Rudolph v. Wagner*, 36 Ala. 698; 77 Amer. Dec. 485, note c.

COLEMAN, J.—When this case was here on a former appeal, (90 Ala. 302), the equity of the bill was fully sustained, and it was held that a court of equity would enjoin the execution of a power of sale, when it appeared that the mortgagee was proceeding in an improper or oppressive manner, or was perverting the power from its legitimate purpose; as where, having refused repeated tender, he files a bill to foreclose, dismisses it without prejudice when the cause was ready for hearing, and advertises the land for sale under a power in the mortgage with the avowed purpose of compelling the payment of another claim which is disputed.—*McCalley v. Otey*, 90 Ala. 302; *Strum v. Childs*, 63 Ala. 473. The evidence reasonably satisfies us that a tender was made in December, 1887, of the full amount due, of the refusal to accept it, and an attempt, after the tender, on the part of the mortgagee to coerce the payment of a disputed claim, not embraced in the mortgage debt. In addition to the testimony offered by complainant on this question, the respondent, Jno. S. McCalley, testifying in regard to the tender made by John M. Hampton, says: "I refused to take it from him unless he paid also Mrs. Octavia A. Otey's merchandise account." The merchandise account constituted no part of the secured debt, and its correctness was controverted.

The present bill was filed on the 19th of July, 1889. It appears from the testimony of the witness Hampton that a tender of the same amount was made about the 1st of July, just before the present bill was filed, and refused upon the same grounds, as that admitted by the respondent, above referred to. After answer and demurrer to the bill, complainants amended their bill, on the 21st day of March, 1890, by averring a readiness and willingness to pay the debt ever since the 31st day of December, 1887, when the debt fell due, and a tender of the money was first made.

The only other assignment of error which we think it necessary to consider, applies to so much of the decree of the court, as denied to the respondent any interest upon his

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debt. A tender of the whole amount due, principal and interest, at any time after the debt falls due, but before suit is brought, stops the interest, and discharges the party from the cost of a subsequent suit. The actual proffer of the money is dispensed with, if the debtor is ready and willing to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it.—*Rudolph v. Wagner*, 36 Ala. 702. In *McCalley v. Otey*, 90 Ala., *supra*, it is said: "A tender refused does not operate to discharge the debtor from the debt, but only releases him from the payment of the interest subsequently accruing; and to have this effect the amount tendered must be in readiness to be paid at any time called for, and on plea must be followed by the payment of the money into court. It is not meant, however, that the identical money tendered must be kept; it is sufficient if the party holds himself ready to pay at all times."

We have already held that the payment of the money into court was not necessary to sustain the equity of the bill for redemption, nor was its payment into court essential under the facts of the case, to authorize a court of equity to enjoin the execution of the power of sale.—90 Ala. *supra*; *McGuire v. Van Pelt*, 55 Ala. 344; *Carlin v. Jones*, *Ib.* 624. We are considering now the question of a tender as affecting the payment of interest. Unless the tender is kept good all the time, that is, unless the debtor is willing and prepared to make payment at any time after the tender, if the creditor should conclude to receive it, and until the money is paid into court upon his plea, the debtor is chargeable with interest. He can not make a tender to-day and then use the money for his profit, and escape the payment of interest. He is released from the payment of interest upon the supposition that he has been deprived of the use of the money, by holding himself in readiness all the time to pay his creditor upon his demand. The burden to make this proof when the tender is denied rests upon the debtor who seeks to avail himself of the benefit of a tender. The answer of the respondent creditor expressly denied the averment of complainant's bill, that he was ready all the time and willing to pay the amount tendered.—*Thayer v. Meeker*, 86 Ill. 474; 77 Amer. Dec. 468, note p. 485; 7 Wait's Act. & Def., 596, § 17. The case of *Curtiss v. Greenbanks*, 24 Vt. 536, is directly in line with *McCalley v. Otey*, 90 Ala., *supra*, that the "identical" money need not be kept on hand, and it lays down the general principle as we have declared it, that he must be ready and willing at all times to make good his tender.

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That case, (24 Vt., *supra*,) does not treat of the question of the burden of proof.

The chancellor was of opinion that the proof sustained the averments of the bill as amended. We have examined the testimony very closely, and we fail to discover any proof tending to show, that complainant kept good the tender. We think it satisfactorily shows a tender on the 31st of December, 1887, and another of the same amount on the 2d of January, 1888, and another about the first of July, 1889, and that the amount previously tendered was paid into the court at the time the amendment to the bill was filed in March, 1890. There is no proof that the tender was kept good, that is a readiness to pay, as we have defined a valid tender, in the intervals from January 2d, 1888 to July, 1889, and from this latter period to March, 1890, when the money was paid into court. We do not think the evidence sufficient on this point, and hold that the chancellor erred in decreeing that respondent mortgagee was not entitled to any interest. In all other respects his decree is affirmed. We will not render any final decree here, but reverse and remand the cause, leaving it in the discretion of the Chancery Court to permit the taking of further testimony on this point, if deemed essential to promote the ends of justice.

Reversed and remanded.

STONE, C. J., *dissenting*.—I can not agree that in passing on the issue of tender, the law casts on him who pleads such defense the duty and burden of proving that he has at all times kept on hand the amount of money he claims to have tendered; and that failing to do so, the plea is not made good. I think, the sounder and better rule is, that if the tender is made, sufficient in amount, and when the tender is pleaded the money is produced and deposited in court, this is all the defendant need do, unless by a further act of the creditor he has been put in default. The person to whom a sufficient tender has been made and refused by him, may destroy the effect of such tender, by subsequently demanding the money tendered. If on such subsequent demand the debtor fails to pay the money, he thereby loses all benefit the tender had secured to him. He must have the money ready to pay *when called on*, and must pay it if called on. This is what I understand to be the proper meaning and extent of the maxim that the tender must be kept good. He must have the money when needed and called for. He need not have it between the time of the tender

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and the filing of the plea, unless it is called for. The law should not require a useless thing.

There are authorities both ways on this question. I think the sounder and more reasonable theory—the one which will secure a mutually just administration of the law—is the one I have sketched. In *Curtis v. Greenbanks*, 24 Vt. 536, the principle is thus stated: "The person tendering is at liberty to use it [the money tendered] as his own. All he is under obligation to do, is to be ready at all times to pay the debt in currency when requested." To the same effect are *Colby v. Stevens*, 38 N. H. 191; *Mich. Cen. R. R. Co. v. Dunham*, 30 Mich. 128; 7 Wait's Act. & Def., 592. There is, to my mind, a sound, logical reason for this. The tender does not change the ownership of the money. It remains the property of the tenderer until accepted, or agreed to be accepted, or until it is deposited in court with the plea, when it passes into the custody of the court. He remains liable for its safe preservation. To me it is illogical to hold that one who is, in every sense, the owner of money, may not use and utilize it, provided he thereby impairs the legal rights of no other person.

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Bill in Equity to enforce a Vendor's Lien.

1. *Bill in equity against a corporation; proof of service of process.* Before a decree *pro confesso* and final decree can be rendered in a suit in chancery, against a corporation, proof must be made that the person upon whom, as shown by the sheriff's return, the process of summons was served, was the agent of the corporation, or occupied such other relation towards it, as justified the service upon him for the corporation.

APPEAL from the City Court of Anniston, in Equity.

Heard before the Hon. B. F. CASSADY.

The bill in this case was filed by A. P. Agee, as the receiver of the Anniston Savings & Deposit Company, against the Oxanna Building Association and H. S. Jewell; and sought to have a lien enforced upon a certain lot for the payment of the purchase-money of the same. The return of the sheriff upon the summons showed that it was "exe-

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cuted by handing the defendant H. S. Jewell a copy of the within on the 20th day of November, 1891, and by handing a copy to W. S. Larned, secretary and treasurer of the Oxanna Building Association." A decree *pro confesso* was rendered, which recited that "In this cause it appears to the clerk that a summons requiring the defendants, H. S. Jewell and the Oxanna Building Association to plead to or answer the bill of complaint in this cause, within thirty days from the service upon them, was served upon H. S. Jewell by the sheriff of Calhoun county, on the 20th day of November, 1891, and upon W. S. Larned, secretary and treasurer of the Oxanna Building Association, on the 28th day of December, 1891; and that said defendants having failed to plead," &c. Final decree was rendered, in which the chancellor held that the complainant was entitled to the relief prayed for. The defendant, the Oxanna Building Association, brings this appeal, and assigns as error the rendering of the decree *pro confesso* and the final decree without proof that W. S. Larned was the secretary and treasurer of the Oxanna Building Association at the time of service upon him.

SAVAGE & COLEMAN, for appellant, cited, *Manhattan Ins. Co. v. Fowler*, 76 Ala. 372; *Lyon v. Lorant*, 3 Ala. 151.

BLACKWELL & KEITH, *contra*.

HEAD, J.—A decree *pro confesso* and final decree were rendered against appellant, a corporation, on service of the summons upon "W. S. Larned, Sec'y and Treas'r of defendant," without proof being made to the court that Larned was such officer at the time of the service. The decree is reversed and cause remanded. See *Oxanna Bldg. Association v. Agee*, *Rec'r*, *ante p.*

Reversed and remanded.

[Louisville & Nashville R. R. Co. v. Davis.]

Louisville & Nashville Railroad Company v. Davis.

Action against a Railroad Company by Employe, for Damages on Account of Personal Injuries.

1. *Opinion of experienced railroad man; competent evidence.*—A witness, who is shown to have been "railroading for ten years," is competent to testify whether "a man with one arm would be as good and competent a brakeman, as a man with two."

2. *Calculation of damages; what to be considered.*—When, in an action to recover damages for personal injuries, the evidence shows the age of the plaintiff, his expectancy of life according to the mortality tables, the rate of his earnings before the injury, his subsequent disability to labor, his helpless condition, and suffering endured, all of these facts must be considered by the jury in the calculation of the damages to be awarded; and charges which are predicated upon facts disclosed in annuity tables introduced in evidence, to the exclusion of these other facts of the case, are properly refused.

3. *Improper charges.*—It is improper to give to the jury charges predicated upon the ignorance and incapacity of jurymen to make a calculation or render a verdict in the particular case.

4. *Charges to the jury when there is conflict in the evidence.*—When there is conflict in the evidence, as to whether the car that collided with the car that inflicted the injury upon the plaintiff was put upon the track by means of a "running switch" or "drop switch," it is improper to charge the jury that a "running switch" was not made.

5. *Custom of well regulated roads no excuse for violation of defendant's rules.*—When the rules of a defendant railroad forbid the making of "running switches," it is no excuse for, and does not relieve the said company from, negligence imputed, when injury results from the violation of such rules, that other well regulated roads are in the habit of making running switches.

6. *Charges; abstract and misleading.*—Charges instructing the jury that the plaintiff should not be allowed compensation for loss of time while confined to his bed, after the injury complained of, giving no reason why such compensation should not be awarded, are properly refused as abstract; and if their purpose was to raise the question of the plaintiff's minority at the time of the injury, the charges are misleading, in that, the principle of law intended to be invoked was not disclosed by the charges.

7. *Charges to the jury.*—Charges that give undue prominence to certain portions of the evidence, and ignore other material facts, are properly refused.

8. *Charges; exacting too high a degree of proof.*—To entitle the plaintiff in a civil action to recover, he must make out his case to the reasonable satisfaction of the jury; and charges, instructing the jury that if they "are in doubt and uncertainty as to whether or not the plaintiff has proven the material allegations of his complaint, they must find for the defendant, are properly refused, as exacting too high a degree of proof.

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APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. James B. Head.

This was an action brought by William E. Davis, a minor, by his next friend, against the Louisville & Nashville Railroad Company, to recover for personal injuries, alleged to have been sustained by the plaintiff, by reason of the alleged negligence of the defendant and its employees; and was commenced on February 5, 1889. The facts of this case, as is stated in the opinion, are substantially the same as they were when the case was here on the former appeal, reported in 91 Ala. 487, where a full statement of the facts is given.

Upon the examination of one W. H. Mothershed as a witness for the plaintiff, and after he had testified in rebuttal that he had been "railroading for ten years," the plaintiff asked him the following question: "State from your experience as a railroad man, and your observations as a railroad man, whether or not a man with one arm would be as good and competent a brakeman as a man with two,—as the same man with two arms." The defendant objected to this question, because it was immaterial, irrelevant and illegal. The court overruled the objection, and the defendant duly excepted. The witness answered, "No, sir, he would not." The defendant moved to exclude this answer of the witness, because it was illegal, immaterial and irrelevant, and duly excepted to the court's overruling his motion.

There were verdict and judgment for the plaintiff, awarding him damages in the sum of \$11,000. The defendant appeals, and its assignments of error on this appeal, go only to the rulings of the court upon the testimony of the witness Mothershed, and to the refusal to give to the jury the several charges requested by it in writing, and to the overruling by the court of the defendant's motion for a new trial. The written charges asked by the defendant, and to the refusal to give each of which the defendant duly excepted, are as follows: (1.) "Although there are tables showing the present value of annuities, at eight per cent. interest, on a single life, at plaintiff's age, yet the court can not take judicial knowledge of what such tables show, and there being no evidence to enlighten you on this subject, I charge you that under the evidence in this case you can not award the plaintiff any damages for his future inability to earn money." (2.) "I charge you, gentlemen of the jury, that if you have not sufficient knowledge to calculate the present value of an annuity for a period not longer than the plaintiff's expectancy of life, estimating such annuity at what his power

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to labor and earn money has been lessened by reason of his alleged permanent injury, you can not award the plaintiff any damages for his future inability to work and earn money; in estimating the value of such an annuity, you can not guess your way to a result." (3.) "To determine the present value of an annuity for the period of plaintiff's expectancy of life, estimating such annuity at what his power to labor and earn money has been lessened by reason of his alleged permanent injury, involves an intricate and difficult calculation; and if you can not make such calculation, you can not award the plaintiff any damages for his future inability to work and earn money." (4.) "If you can not, from the evidence, estimate the present value of an annuity for a period not longer than plaintiff's expectancy of life, estimating such annuity at what his power to labor and earn money has been lessened, by reason of his alleged injury, you can not award the plaintiff any damages for his future inability to work and earn money." (5.) "I charge you, gentlemen of the jury, that under the evidence in this case, the car was not placed upon the repair track by means of a running switch." (6.) "The undisputed evidence in this case shows that the car was not put upon the repair track by the making of a running switch." (7.) "If the car, when it was turned loose by the engine, was running at from two to three miles an hour, and if when the car passed over the switch, it was running at the rate of from four to six miles an hour, then I charge you that the car was not put upon the repair track by the making of a running switch." (8.) "It is the duty of the jury before they award the plaintiff any damages for his diminished capacity to earn a livelihood by reason of his injury, if they believe from the evidence that the plaintiff is entitled to such damage, to calculate the present value of an annuity equal in amount to the amount the jury may find, from the evidence, to be the amount which would compensate plaintiff for his diminished capacity to earn a livelihood for a period of one year, and continuing during a period not greater than the plaintiff's expectancy of life, considering the uncertainty of life and the fact that the plaintiff may die at any time; and if the jury are unable from the evidence and their own knowledge to calculate the present value of such an annuity, they are not authorized to award plaintiff any damage for such diminished capacity to earn a livelihood." (9.) "The measure of damages for plaintiff's diminished capacity to earn a livelihood, if the jury believe the plaintiff is entitled to such damage, is such a sum as, if put out at compound interest, at the legal rate,

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would just suffice to pay the plaintiff an annuity equal in amount to the amount which the jury may find from the evidence would compensate the plaintiff for one year for his diminished capacity to earn a livelihood, and for a period of time not greater in duration than the plaintiff's expectancy of life, considering the uncertainty of life, and the fact that plaintiff may die at any time." (10.) "That if the jury believe from the evidence that a drop switch was made, and not a running switch, in putting the car in and upon the said repair track, and that the witness McNutt used due care, in and about putting said car upon said repair track, then I charge you that you must find for the defendant." (11.) "If you can not from the evidence ascertain or determine the present value of an annuity for the period of plaintiff's expectancy of life, estimating such annuity at what plaintiff's power to labor and earn money has been lessened by reason of his alleged injury, then you can not award the plaintiff any damages for his future inability to work and earn money." (12.) "If the jury believe from the evidence that a drop switch, and not a running switch, was made in and about putting the car, which it is alleged caused plaintiff's injury, upon the repair track, then I charge the jury that there can be no recovery on account of alleged negligence of the engineer in handling and running the engine." (13.) "I charge you, gentlemen of the jury, that you must not award the plaintiff any damages for loss of time, while he was confined to his bed from the effects of the alleged injury during the five weeks just after the accident testified to by the plaintiff." (14.) "I charge you, gentlemen of the jury, that in estimating the damage to be awarded the plaintiff for his diminished capacity to earn a livelihood because of his injury, you can not consider in this case what plaintiff's expectancy of life was at the time he was injured." (15.) "That the jury must try this case according to the evidence and law, as given them in charge by the court, and a true verdict render according to the evidence and law, and if all the evidence leaves the jury in doubt and uncertainty as to whether or not the plaintiff has substantially proven the material allegations of his complaint, they must find for the defendant." (16.) "The burden of proving substantially the material allegations of the complaint is cast by the law upon the plaintiff, and if the jury are in doubt and uncertainty as to whether or not plaintiff has so proven his complaint, they must find for the defendant." (17.) "That if the jury believe from the evidence that the plaintiff's alleged injury was caused from a defective brake, or a failure of said

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brake to work on the car which defendant had switched upon the alleged track upon which stood the car, upon which the plaintiff was at work, at the time of the alleged injury, and if the jury further believe from the testimony that immediately before said car was switched upon said track said brake had every appearance of being in good order and condition, and that said car was not a car of defendant's, and that McNutt, immediately before said car was switched upon said track, examined said brake and turned the same, and that said brake then appeared to work well, and that after said car had been switched upon said track, said brake failed to work well, and said McNutt, on account of said brake failing to work well, could not stop said car by the exercise of due diligence and skill, then I charge you that your verdict must be for the defendant." (18.) "If you should find for the plaintiff, in estimating the damages, the plaintiff would be entitled to for his future inability to work and earn money, I charge you that he would be entitled to the present value of an annuity for a period of not longer than his expectancy of life, estimating such annuity at what his power and labor to earn money has been lessened by reason of his alleged permanent injury, and there being no evidence showing what the present value of such annuity is, you can not award the plaintiff any damages for his future inability to work and earn money." (19.) "If you shall believe from the evidence, that, before the car was turned loose from the engine, the brake on the car was carefully inspected; that on such inspection, the brake appeared to be in good condition; that at the time the car was turned loose, it was running at such a speed that McNutt was able to stop the car with a good brake in two car lengths; that at the time the car was turned loose it was twelve to twenty car lengths from the car with which it collided; that McNutt did all he could to stop the car, and was unable to stop it, not because of his inability with one arm to properly apply the brake; that when McNutt found that he could not stop the car, he did all he could to give warning—the car was unmanageable,—then you must find for the defendant." (20.) "That if the jury believe from the evidence that the car which caused the injury to plaintiff was out of repair, and was put on the repair track for repairs, and if the jury believe from the evidence that McNutt used ordinary care in putting said car on said track and in the movement of the same, then you must find for the defendant." (21.) "That if the jury believe from the evidence that the car could have been stopped by McNutt within two car lengths with the brake on

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the car, if it had worked well, and that said McNutt took due care to see whether or not said brake on said car was in proper condition, and after such care he believed that said brake was in proper condition, then I charge you, that it would not have been negligence upon his part to put said car upon said track in the manner in which the evidence showed it was put upon said track in this case." (22.) "If you shall believe from the evidence that before the car was turned loose from the engine, the brake on the car was carefully inspected, that on such careful inspection it appeared to be in good condition; that at the time the car was turned loose it was running at a speed of two or three miles an hour; that at such speed McNutt was able to stop the car with a good brake in two car lengths; that at the time the car was turned loose, it was twelve to twenty car lengths from the car with which it collided, then I charge you, gentlemen of the jury, that it was not negligence to turn the car loose under such circumstances." (23.) "If the jury believe from the evidence that McNutt, the witness in this case, was at the time of the alleged accident a competent brakeman or switchman; and if the jury believe that a drop switch, and not a running switch, was made in and about placing said car, which it is alleged caused plaintiff's injury upon said repair track, then I charge you your verdict must be for the defendant." (24.) "Under the evidence in this case, the jury are not authorized to award more than nominal damages for the difference in the earning capacity of the plaintiff before and after his injury, caused by his injury." (25.) "If you believe the evidence you must find for the defendant." (26.) "Under the evidence in this case, you can not allow the plaintiff any damages for loss of time." (27.) "I charge you, gentlemen of the jury, that you must not allow plaintiff damages for loss of time while he was confined to his bed from the effects of the alleged injury." (28.) "If the jury should find for the plaintiff, in estimating the plaintiff's damages for his diminished capacity to earn a livelihood by reason of his injury, the measure of such damages would be the present value of an annuity equal in amount to the amount the jury find to be the annual diminution in plaintiff's capacity to earn a livelihood, by reason of his injury, for a period not longer than the expectancy of plaintiff's life, and unless the jury can determine from the evidence what the present value of such annuity would be, they are not authorized to award the plaintiff any damages arising from such diminished capacity to earn a livelihood." (29.) "I charge you, gentlemen of the jury, if you believe

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from the evidence that McNutt was not guilty of any negligence, then you must find for the defendant." (30.) "That there can be no recovery on the 2d, 3d and 4th counts of the complaint, if the jury believe from the evidence that McNutt had charge of the car, which caused the alleged injury, and that he used due diligence to discover whether or not the alleged defective brake was in good working condition immediately before said car was switched, and used due care in the management of said car and did all in his power, and all that could have been done by a competent brakeman to stop said car, so as not to injure any one under or at work upon cars standing on said track upon which said car had been switched, and upon which it was being moved." (31.) "That if the jury believe from the evidence that McNutt was entrusted by defendant with the duty of seeing that the brake on said car which caused the alleged injury to plaintiff was in proper condition, and that the defect in said brake did not arise from any negligence of the said McNutt; and that said McNutt used due diligence to discover whether said brake was in good working condition, and did not discover any defect in said brake, and that said McNutt had control of said car, which caused the alleged injury to plaintiff, and that he managed the movement of said car with due care, then I charge you that the verdict must be for the defendant." (32.) "That the defendant did not owe to the plaintiff the absolute duty in moving its car not to injure him, but to use ordinary care to save him harmless, and if the jury believe from the evidence that the alleged defective brake was not known to the defendant or its employes entrusted with the duty of seeing that it was in proper condition, and that the defendant's said employee used ordinary care to see that said brake was in proper condition before he undertook to switch said car on the track, where stood the car upon which the plaintiff was at work, and that the person in charge of said car used due diligence in its management, and did all he could, and that could have been done by a competent switchman, to save the plaintiff harmless, then you must find for the defendant." (33.) "That if the jury believe from the evidence that the plaintiff's alleged injury was caused by the use of a defective brake or failure of said brake to work well on the car which defendant had switched upon the track, upon which stood the car, upon which the plaintiff was at work, at the time of his alleged injury, and that said car so switched, as aforesaid, did not belong to defendant, and that said defect was not apparent, but that the said brake had the appearance of being in good working or-

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der and condition, and that defendant's employees took reasonable care to ascertain that said brake was in good order and condition before said car was switched upon said track, and then I charge you that you must find for the defendant." (34.) "That if the jury believe from the evidence that the alleged injury to plaintiff was caused from a defective brake, or the failure of the brake to work well, on the car which defendant had switched upon the track, where stood the car upon which plaintiff was at work at the time of his alleged injury, and that said car was not the property of defendant, and that said defect in said brake was not apparent, but it had the appearance of being in good working order and condition, and that said defect in said brake was not known to defendant or its employees in charge of said car, and that said employees in charge or control of said car took due care to find out whether said brake was in good working order and condition immediately before said car was switched upon said track, and failed to discover said defect in said brake, then I charge you that your verdict must be for the defendant." (35.) "If you believe the evidence, you must find for the defendant under the second count of the complaint." (36.) "If you believe the evidence, you must find for the defendant under the third count of the complaint." (37.) "If you believe the evidence, you must find for the defendant under the fourth count of the complaint." (38.) "If the jury believe from the evidence that well regulated railroads usually make such switches as the evidence shows was made in this case, and under like circumstances as such switch was made, then I charge you that it was not negligent for defendant to have made such switch."

HEWITT, WALKER & PORTER, for appellant.

CUMMINGS & HIBBARD, *contra*.

HARALSON, J.—The facts of this cause are substantially the same as they were on the former appeal, and they are set out in the report of the case in 91 Ala. 487.

The opinion of the court in that appeal is decisive of many of the questions raised in this one, and relieves us from further discussion of them.

The question propounded by plaintiff to the witness, Mothershed, on the rebutting examination, was not improper. He was shown to be an experienced railroad man, and was competent to give his opinion touching the matter about which the enquiry was made. Besides, the defend-

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ant had just propounded the same question, in substance, to four of its witnesses, who, in answer thereto, had given their opinions of McNutt as a brakeman, and we ought not to deny that privilege to the plaintiff, where the witness is shown to be of the class, competent to give an opinion.

Charges asked by defendant and refused, numbered 1, 2, 3, 4, 8, 9, 11, 14, 18, 28, are of a class, predicated more or less upon the annuity tables in evidence, and upon considerations growing out of them. The plaintiff is shown to have been 18 years old, at the time of the injury to him, and that his expectancy of life, according to these tables, was 43 years. This was important and competent evidence, entering into the calculation of his damages, but it was not all. The evidence, in addition, tended to show, that, at that time, he was earning \$1.50 per day; what was his disability since, to labor and earn a livelihood; his almost helpless condition and the pain and physical suffering he endures. All these facts together, without the exclusion of any, furnished the proper *data* for a calculation of damage by the jury. The verdict they rendered shows they did make some sort of a calculation, and the presumption is they were competent to make it. When a jury is duly organized to try a cause, it is not proper to give a charge, asked by either party, predicated upon their ignorance or incapacity to make a calculation or render a verdict.

These charges, were, each, subject to the infirmity, either of selecting, or of giving undue prominence to parts of the evidence, and ignoring other parts, as predicates for instructions, or of being argumentative, confusing or misleading, and were properly refused.

Those numbered 5, 6, 7, 10, 12, 23 and 38 were each properly refused. The witness Langford testifies, that the engineer made a drop switch, and that there is no difference between a drop and a running switch, and Crawford testified, in substance, to about the same thing. O'Connor states, that it is a running switch when made up, and a drop switch when made down grade.

The witness Warner, an employe of the defendant company, testified that the way in which this car was put in on the repair track was a running switch, that it is a running switch when up, and a drop switch when down grade, the engine being in front in both instances. The evidence of these witnesses, therefore, tends to show, when taken in connection with all the evidence, that the car doing the damage, was run upon the repair track by means of a running switch. It was improper, then, to charge the jury,

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that a running switch was not made. The conflicts on the question, if important, were for the jury to settle. But, what difference does it make whether the car was put in on the repair track in the one or the other method, if the one employed was so carelessly performed, as to do the mischief that followed? The question is not the kind of a switch by which the car was put upon the track, but the carelessness with which it was done. And it is a poor excuse to give for the injuries done to the plaintiff, to say, that the like method of switching cars was being employed on other well regulated railroads. The rules of this company, as was shown, forbade the use of running switches, and if the employes of the defendant violated that rule, as the jury, under the evidence, might have concluded, and the injury to plaintiff was the result, the company can not be heard to plead that other well regulated roads were in the habit of doing as it had done.

There was no error in the refusal to give charges Nos. 17, 19, 20, 21, 22, 32, 33, 34. They ignore the rule of the company against running switches, and the evidence as to the speed with which the car was run upon the repair track, and assume as a matter of law, that making such switch was not negligence, in any aspect of the evidence, and this, when to make such a switch was against the rules of the company, and when one aspect of the evidence tended to show, that the car was run in at the rate of 8 or 10 miles an hour, which we held on the former appeal to be negligence.

Charges 24, 25 and 26 each amounted to the general charge, and neither, under the evidence, was proper to have been given; and the same is true of Nos. 35, 36 and 37.

Nos. 13 and 27 suggest no reason why plaintiff should not be allowed compensation for loss of time while confined to his bed after the injury; and if their purpose was to raise the question of his minority at the time, and that he could not, on that account, recover compensation for loss of time while confined, they are misleading, in that the principle of law intended to be invoked was not made known to the court by the charges.

The 29th, 30th and 31st, each, proceed on the assumption, that if McNutt was not guilty of negligence, no recovery could be had by the plaintiff. They ignore the rule of the company against running switches, and the speed of the car, and assume as a matter of law, that making such a switch was not negligence in any aspect of the evidence;

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and 30 and 31 are further faulty in assuming that the brake was out of order.

The ones numbered 17, 32, 33 and 34 are each bad, in that they ignore material facts in the evidence, which, if found to be true, ought to be considered in connection with those hypothesized.

The oath of the jury is "a true verdict render according to the evidence." The burden the law casts on a plaintiff in a civil action to entitle him to a verdict, is to make out his case to the reasonable satisfaction of the jury, by a preponderance of the evidence. Charges 15 and 16 exacted too high a degree of proof, and were erroneous.—*Rowe v. Barber*, 93 Ala. 422; *Thompson v. L. & N. R. R. Co.*, 91 Ala. 496; *Wollner v. Lehman, Durr & Co.*, 85 Ala. 275; *L. & N. R. R. Co. v. Jones*, 83 Ala. 377.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

Harrison v. Hamner.

Motion to Quash Execution.

99 606
98 290

1. *Summary execution on replevy bond; bond must be strictly statutory.* A replevy bond, to justify the issuance of a summary execution upon its return as forfeited, must follow strictly the provisions of the statute.

2. *Same; motion to quash.*—A motion to quash a summary execution issued upon a forfeited replevy bond may be acted on at any time when the court is in session, without regard to the term of the court at which the judgment in the original suit was rendered.

3. *Same; exception to ruling thereon.*—When a motion to quash an execution, based upon several grounds, is overruled, an exception reserved to such ruling need not be several as to each of the grounds.

APPEAL from the City Court of Gadsden.

Heard before the Hon. JOHN H. DISQUE.

This is an appeal from the judgment of the City Court of Gadsden overruling a motion to quash an execution issued on a forfeited replevy bond.

The appellee, D. T. Hamner, brought an action for detinue against one J. A. Powers, for certain described property. The property was seized by the Sheriff, and upon the said Powers giving a replevy bond for certain portions of the property, with the appellants as his sureties thereon, the

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property was delivered back to said Powers. Judgment was rendered in the detinue suit against the defendant for the property sued for, and damages for the detention thereof together with costs. The condition of the replevy bond was as follows: "The condition of the above obligation is such that, whereas a summons and complaint in detinue issued from the City Court of Etowah county in favor of D. T. Hamner against the above bound J. A. Powers for the recovery of the property hereinafter described has been placed in the hands of Wm. Chandler, sheriff of said county, and said sheriff has taken possession of said property to-wit: one black horse mule, tall and slender built, and black mule, one new set of double wagon harness and one three inch thimble skein two horse Tennessee wagon, the said property was mortgaged to D. T. Hamner and T. L. Johnson, which property has been delivered to the said defendant upon his entering into this bond. Now, if the said J. A. Powers, in the event he is cast in the said suit, will, within thirty days thereafter, deliver the said property to the plaintiff, and pay all costs and damages which may accrue from the detention thereof, then this obligation to be void, otherwise to remain in full force and effect. And to secure the payment of this bond (should it be forfeited) we hereby waive the right to claim any exemption under the Constitution and statutes of Alabama."

On February 23, 1892, the sheriff returned this bond with the following endorsement thereon: "The property for which this bond was given has been delivered to the plaintiff, but the damages assessed for the detention and the cost has not been paid, and this bond is returned forfeited as to such damages and costs." Upon this return the clerk issued an execution on the bond as forfeited as to damages and costs. Thereupon the sureties on said bond moved the court to quash the execution issued by the clerk upon the following grounds: "1st. That the said property was delivered to the plaintiff, and there was no forfeiture of said bond except as to damages for detention, which was assessed by the court at \$123, besides costs, while the said execution was issued for \$189.37, besides costs, against these sureties. 2d. That damages were assessed for the detention of all the property mentioned in plaintiff's complaint against these sureties, when they only gave bond for a part of the property mentioned in said complaint, and are not liable for detention of all the property therein mentioned. 3d. That the condition of said bond is that a summons and complaint in detinue issued from the City Court of Etowah county, &c,

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and is not a statutory bond on which an execution could issue as there is no such court of Etowah county."

Upon the submission of this motion, the court sustained the first ground of the motion, deducted \$66.37 from the amount recited in the execution, and overruled the second and third grounds of said motion; and, as recited in the bill of exceptions, "to the overruling of said 2d and 3d grounds movants except." This judgment is now appealed from, and is here assigned as error.

GEO. D. MOTLEY, for appellant, cited *Anderson v. Bellenger*, 87 Ala., 334; Code of 1886, § 2717.

DORTCH & MARTIN, *contra*.—1. The motion to quash came too late. Acts of 1890-91, p. 1102. *Hudson v. Modawell*, 64 Ala. 483. 2. The exception to the ruling of the court was general and cannot be considered. A separate exception should have been reserved to the overruling of each ground of the motion.

STONE, C. J.—The replevin bond given in this case is clearly not a statutory bond, upon which a summary execution could issue, when the sheriff returned the bond forfeited. The execution was therefore irregular, and subject to be quashed on a proper motion. Code of 1886, § 2721; *Lunsford v. Richardson*, 5 Ala. 618; *Moffett v. Br. Bank of Mobile*, 7 Ala. 593; *Br. Bank v. Darrington*, 14 Ala. 192; *Russell v. Locke*, 57 Ala. 420. The bond, however, is a good common law obligation, and will support an action for its breach. *Wood v. Coman*, 56 Ala. 283; *Masterson v. Matthews*, 60 Ala. 260; *Ernst v. Hogue*, 86 Ala. 502.

Counsel for appellee do not gainsay the foregoing propositions, but they contend that they are for certain specified reasons inapplicable to the case presented in the record before us.

First: It is contended that, for the purposes of the motion to quash, the City Court of Gadsden cannot be regarded as being in session when this motion was ruled on. The precise point of this contention is, that under the statute creating that court, approved February 18, 1891—Sess. Acts, 1092-1103—it is enacted, "That final judgments rendered in said court shall, after the expiration of ten days from their rendition, be taken and deemed as completely beyond the control of the court, as if the term of the court at which such judgments are rendered had ended at the end of said ten days;" with certain provisos, not material to a proper

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decision of this case. § 27, p. 1102. The motion to quash was made more than ten days after the judgment was rendered in the detinue suit.

There is nothing in this objection. The execution which the motion sought to quash was not issued pursuant to any order of the court; and granting the motion would, in no sense, have been the taking or assertion of control over the judgment of the court. It was a statutory execution, issued by the clerk on the return of the bond forfeited, sometimes called an office judgment. A further reason. A motion to quash an execution, it would seem, could never involve interference with, or change of the judgment of the court. The inquiry on such motion must needs be, whether or not under the judgment rendered and the attendant facts, the process of execution and its enforcement are justified under the law. Such motion may be acted on at any time when the court is in session, without any regard to the term of the court at which the judgment was rendered. The court in such action simply supervises the action of its ministerial officers so as to prevent misuse or abuse of its process. 3 Brick. Dig., 454, §§ 92, 93.

Second: It is objected that the exception in this case was not properly reserved. In the motion to quash, two grounds were stated, one of which it is contended is insufficient and frivolous. The court overruled the motion to quash, and movant excepted. The contention is, that the exception should have been several as to each of the grounds on which the motion was rested.

We think this is a misapprehension of the principle which requires that the exception must not be broader than the error complained of. The motion was to quash the execution, and the exception was to the order of the court overruling that motion. That was the error complained of—not the ground on which the ruling was based. Like objections to the introduction of testimony, some of which objections are sufficient and others insufficient, if the court admit the testimony and there is a single exception to the ruling, this raises the question and makes it our duty to consider it. The error in such case consists in receiving illegal evidence, and not in overruling a sufficient objection to it because it is associated with another that is insufficient. *Utile per inutile non vitiatur.*

The judgment of the City Court is reversed, and a judgment here rendered quashing the execution.

Reversed and rendered.

[Bolling & Son v. Pace.]

Bolling & Son. v. Pace.*Bill in Equity to foreclose a Mortgage.*

1 *Bill to foreclose mortgage; when defendant not estopped by former litigation.*—A defendant in a foreclosure suit, asserting a title paramount under a mortgage, executed prior to the mortgage sought to be foreclosed, is not estopped by a decree rendered in a former suit, to which he was a party, not involving the validity of his mortgage or the property therein conveyed, in which it was decreed that the mortgage sought to be foreclosed was a valid security in the hands of the complainant.

2. *Same; not affected by right to file cross bill.*—The fact that the defendant in a suit to foreclose a mortgage was a defendant in the former suit and could have propounded his interest as claimed under a prior mortgage only by a cross bill filed in such former suit, praying the foreclosure of said mortgage does not prevent such defendant from asserting his claim under said mortgage as a defense in the subsequent suit.

3. *Parties to foreclosure suit; when bill should be dismissed.*—In a suit to foreclose a mortgage only those claiming title subordinate to the mortgage should be made parties, and if the answer of a defendant discloses that he relies on a paramount title, the bill should be dismissed as to him, unless the complainant is prepared to prove that such title was, in fact, acquired subsequent to the mortgage.

4. *Same; effect of decree on appeal; complainant estopped.*—When in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein.

APPEAL from the Chancery Court of Crenshaw.

Heard before the Hon. JOHN A. FOSTER.

The facts of this case are sufficiently stated in the opinion.

GAMBLE & BRICKEN, for appellants, cited *Strauss v. Meertief*, 64 Ala. 299; *Gilbreath v. Jones*, 66 Ala. 129; *Tankersley v. Pettis*, 71 Ala. 179; *McCall v. Jones*, 72 Ala. 368.

I. H. PARKS, *contra*.

McCLELLAN, J.—This bill is filed by R. E. Bolling & Son against W. H. Cook, R. R. Pace and N. A. Pace, his wife,

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106	644
99	607
109	440
99	607
119	164
99	607
138	579

[Bolling & Son v. Pace.]

and Rufus Cook. Its averments, so far as material, are: On Nov. 13, 1884, W. H. Cook sold the land, which is the subject matter in litigation, to R. R. Pace, executing a conveyance in fee to the purchaser. On the same day Pace and wife executed a mortgage to secure the payment of the purchase money, which was also evidenced by Pace's note, to said Cook. On January 8, 1885, W. H. Cook transferred and assigned said note and mortgage to Bolling & Son for value. On May 16, 1890, the present bill was filed for the purpose of foreclosing said mortgage. With respect to Rufus Cook its averment is that he "sets up some kind of a pretended claim to the lands embraced in said mortgage, but that if said Cook has any claim at all on said lands it is inferior and subordinate to" that of the complainants under said mortgage. After the usual prayer for process against each of the defendants, &c., for an account to ascertain the amount of the secured debt, and for a decree for its payment by a day to be named in the decree, the complainants pray further that, "in default of such payment, your Honor will decree that the defendants R. R. Pace and N. A. Pace, and all persons claiming under them, may be absolutely barred and foreclosed of and from all rights and equities of redemption in and to the mortgaged property and any part thereof, and that the said mortgaged property be sold by the decree of this honorable court, and out of the proceeds of such sale pay to your orators the amounts ascertained to be due them on the mortgage, with the costs of this suit;" and this is followed by the prayer for alternative and general relief, if complainants are mistaken as to the relief specially prayed.

Only Rufus Cook made defense to the bill. He answered admitting its averments as to the sale and conveyance by W. H. Cook to Pace, the mortgage by Pace and wife to said W. H. Cook to secure the purchase money, but denying "the amount [averment?] of a transfer of said mortgage to complainants by defendant Wm. H. Cook." Continuing, he answers that it is true that he sets up a claim to the lands described in said mortgage, but that his claim and title to said land is not pretended, and that it is not subordinate to the right and claim of complainants, but that at the date of the pretended sale by W. H. Cook to Pace, said Cook did not have the legal title to said land, or the right to sell the same to Pace, or any one else, but that the legal title at the time of said sale and at the time of the execution of the mortgage by Pace "was in one Jacques Loeb, conveyed by Jefferson Cook and Martha Cook by mortgage deed executed on

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the 13th day of March, 1882;" that said mortgage was transferred and assigned for value by said Loeb to Marks & Gayle on January 9, 1885, and by said Marks & Gayle transferred and assigned for value to William T. Tranum on April 8, 1886; and that said Tranum, on December 24, 1887, "bargained, sold and conveyed to respondent [said Rufus Cook] by absolute deed the lands described in the mortgage from Pace and wife to W. H. Cook;" and that said respondent "is in possession of said lands and has occupied the same from the date of the purchase from said Tranum." The mortgage from Jefferson and Martha Cook, together with the several transfers thereof alleged in the answer, and the deed from Tranum to Rufus Cook are made exhibits to the answer.

The evidence on which the case was submitted, aside from the exhibits to the bill and answer and proof of the execution of the deed by Tranum to Rufus Cook, consisted of the pleadings, exhibits, depositions, orders, reports on reference, decrees, &c.—the whole file and record—in another case, that of R. E. Bolling & Son against W. H., Rufus, Jefferson and Martha Cook, and W. T. Tranum, which had been prosecuted and determined in the Chancery Court of Crenshaw County. This bill had two main purposes. W. H. Cook and Jefferson Cook had executed to Bolling & Son a note evidencing indebtedness which was originally due in part from Jefferson Cook, and in other part from W. H. and Rufus Cook, composing a partnership. To secure its payment W. H. Cook executed a mortgage to Bolling & Son. Subsequently, it seems, Jefferson Cook claimed that the property embraced in this mortgage, or a part of it, did not belong to W. H., but to himself, Jefferson Cook. The bill sought a foreclosure of the mortgage and to subject any title Jefferson had in the property to the payment of the debt secured by it, on the theory that the latter had induced Bolling & Son to take the mortgage by representing the title of the property to be in W. H. Cook, thereby estopping himself to afterwards assert the contrary. Beyond this, the bill sought to set aside as fraudulent a certain conveyance made by Jefferson Cook and Martha Cook, his wife, to said Tranum, and to subject the property embraced therein to the satisfaction of the note made by W. H. and Jefferson Cook to the complainants. The bill alleges that to further secure the debts evidenced by said note, W. H. Cook transferred and assigned to Bolling & Son the Pace note and mortgage, which are described and made exhibits. And the mortgage before referred to of W. H. Cook, which is made an exhibit

[Bolling & Son v. Pace.]

to the bill, contains this provision: "And I, [W. H. Cook] hereby further transfer and assign to said R. E. Bolling & Son the debt of 325 dollars due from R. R. Pace for land sold to him, and the mortgage securing said debt made by R. R. Pace." But Pace and his wife are not made parties to that bill; it contains no averment looking to any relief in respect of that note and mortgage and no prayer for any such relief. An issue was assumed in this regard in taking the testimony as to whether W. H. Cook or Jefferson Cook, had title to the Pace land at the time of its sale by the former to Pace, and this issue was gone into by both parties without objection. Similarly, the evidence adduced upon it was unobjected to on the ground of its competency though most, if not all, of it might have been excluded because of its parol character, the loss of muniments of title not being sufficiently shown. The evidence on this point showed that in 1883, Jefferson Cook conveyed this land to W. H. Cook, and that whatever interest or title Jefferson had in and to it at that time was in W. H. when he sold to Pace, so that by his conveyance to Pace, the latter's mortgage back to him, and his transfer of that mortgage to Bolling & Son, the complainants became invested for the purposes of security with all of Jefferson Cook's right and title in the property. It also appeared in the evidence adduced in that case that Trantum was claiming this land under a sheriff's deed which was attacked as fraudulent. And in the final decree in that case Trantum was perpetually enjoined from setting up title to or seeking to recover the land embraced in Pace's mortgage, though there does not appear to have been any predicate for this relief in the bill; and it is therein recited or decreed that this Pace mortgage is a valid security in the hands of Bolling & Son, for the note of W. H. and Jefferson Cook, but the chancellor declared in this decree that it could not be foreclosed in that case for the want of necessary parties, averments and prayer. Nothing whatever appears in the pleadings, the exhibits, the testimony or the decrees in that case, *Bolling & Son v. Trantum et al.*, with reference to the mortgage executed by Jefferson Cook and his wife in 1882 to Jacques Loeb, and under which by mesne transfers and a conveyance, amounting to a transfer, Rufus Cook in the present case claims title to or interest in the Pace land, the mortgage upon which is now sought to be foreclosed. This Loeb mortgage, it is to be borne in mind, was executed by Jefferson Cook prior to his conveyance, to W. H. Cook. The conveyance, therefore,

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only carried his equity of redemption in the land, that was the interest sold by W. H. to Pace, and the interest which is covered by complainant's mortgage from Pace. The Loeb mortgage was also prior to all of the transactions attacked for fraud in the case of *Bolling & Son v. Tranum*, to the note executed by W. H. and Jefferson Cook to Bolling & Son, and to the mortgage executed by W. H. to secure said note. It is no where hinted that this mortgage of 1882 was invalid, or that it has ever been discharged. Rufus Cook, according to the evidence in the present case, held it while the former suit was pending at the time of the final decree therein. And he was a party to that suit, but for purposes entirely foreign to the foreclosure of his interest in the Pace lands under this mortgage or otherwise. The interest he now sets up was not only not involved in that suit, but could not have been, unless possibly he had propounded it in a cross bill praying a foreclosure of his mortgage, and a party is never precluded under the circumstances shown here by merely not availing himself of the right to file a cross bill. Moreover, had he elected that course, on the evidence upon which this case is, and that one would, we assume, have been tried, the decree must have gone in his favor. There is, we conclude, therefore, nothing in the record of the former litigation having any bearing on the interest now asserted by Rufus Cook, and the decree in that cause did not cut off, foreclose, or in any degree affect his rights under the mortgage executed in 1882, by Jefferson and Martha Cook to Jacques Loeb.

Rufus Cook having thus at law the legal title to the land in controversy, paramount to the title of complainants under the mortgage, and in equity the older and superior mortgage, should not have been made a defendant to the present the bill. This is not the proceeding in which to determine and have settled the absolute final title to mortgaged realty. The purpose of a foreclosure suit is to settle interests claimed or existing in subordination to the mortgage. Only those should be made parties who are, or who claim under, the parties to the instrument. When the bill shows that a defendant asserts title paramount to the mortgage it is demurrable. When it avers that a party defendant claims an interest which is subordinate to the mortgage, and the answer of such party discloses that he relies upon a title paramount, the bill should be dismissed as to him, unless the complainant is prepared to prove that such claim, interest or title in fact accrued subsequent to the mortgage. Otherwise, no decree in the case can bar

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or affect the adverse claim. Where this is not done, that is where the asserted adverse claim is not shown to be really in subordination to the mortgage, and a judgment in the usual form is entered against all the defendants, it will not bind the prior interest of such defendant, "but will be reversed on appeal, even though made after a hearing on pleadings and proof; because there can be no foundation in the complaint for a decree upon a question of paramount title."—*Wiltzie on Mortg. Foreclosure*, §§ 191, 421; 2 *Jones on Mortgages*, § 1445; *Cavning v. Smith*, 6 N. Y. 82; *Summers v. Bromley*, 28 Mich. 125.

But on the other hand, where, as in this case, the defendant, brought in under a bill alleging that he asserts some claim to or interest in the property, but that whatever interest he has is subordinate to the mortgage, and praying only that all claims under the mortgagor, &c., be foreclosed, sets up in his answer a paramount claim and the same is litigated without objection and decided in his favor, the decree can not be attacked on appeal on the ground that the question could not properly be litigated in that action. "Both parties, having appeared and having actually litigated the issue in this form, will be bound by the decree."—*Wiltzie on Mortgage Foreclosures*, § 1; *Helck v. Reinheimer*, 105 N. Y. 470; *Barnard v. Ouderdouw*, 98 N. Y. 158, 163; *Jordan v. Van Epps*, 85 N. Y. 427, 435.

The parties tried this case without objection as if the issue as to the superiority between the rights of Bolling & Son, under the Pace mortgage, and of Rufus Cook under the Loeb mortgage were formally in the case. The Chancellor correctly determined that issue in favor of Cook, and dismissed the bill. His decree will not be disturbed here although the question was not properly in the cause, and might have been eliminated from it.

Affirmed.

99 612
100 553

Allen v. McCullough, et al.

Bill in Equity to cancel Conveyances of Land.

1. Lender of money not chargeable with facts known to the agents of the borrower.—One who lends money upon a mortgage on lands, regularly executed, is not chargeable with the knowledge of brokers, who negotiated the loans as the agents of the borrower, that the mort-

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gagor's title to the said lands was acquired through a voluntary conveyance from his daughter, a married woman; the brokers not being the agents of the lender, and the lender having no knowledge or notice of the attempted evasion of the law.

2. *Dismissal of bill in equity.*—When the relief prayed for in a bill in equity can not be granted, but the bill can be amended so as to allow the complainant some relief, it should be dismissed without prejudice.

APPEAL from the City Court of Montgomery.

Heard before the Hon. THOMAS M. ARRINGTON.

The bill in this case was filed by the appellant, Sophronia E. Allen, against Thomas McCullough and others, and prayed for the cancellation of certain conveyances, executed by the complainant and the respondent, Thomas McCullough. The facts of the case are sufficiently stated in the opinion. On the hearing of the cause, the chancellor decreed that the complainant was not entitled to the relief prayed for, and dismissed her bill. On the present appeal, prosecuted by the complainant, she assigns as error this decree of the chancellor.

WATTS & SON, for appellant, cited *Brunson v. Brooks*, 68 Ala. 248; *Tutwiler v. Montgomery*, 73 Ala. 263; *Dudley v. Witter*, 46 Ala. 664; *Corbitt v. Clenny*, 52 Ala. 480; *Wallace v. Nichols*, 56 Ala. 321; *Creswell v. Jones*, 68 Ala. 420; *Herbert v. Hanrick*, 16 Ala. 581; *Fenno v. Sayre*, 3 Ala. 458; *Wade on Notice*, § 276; *Conner v. Williams*, 57 Ala. 131; *Williams, Birnie & Co. v. Bass*, 57 Ala. 487.

WEBB & TILLMAN and CALDWELL BRADSHAW, *contra*, cited *Pique v. Arendale*, 71 Ala. 91; *Tutwiler v. Montgomery*, 73 Ala. 263; *Bloomer v. Henderson*, 77 Amer. Dec. 457; *Humphrey v. Hurd*, 29 Mich. 45; *Scott v. Gallagher*, 14 S. & R. 333; 5 Pick. 450; 3 Sandford's Chancery, 176; 7 Watts, 382.

COLEMAN, J.—The averments of the bill show that complainant, a married woman, possessed of a statutory separate estate in lands, desiring to assist her father, Thomas McCullough, to raise a certain sum of money by mortgage of real estate, conveyed to him, without a valuable consideration to her, by deed, her lands. The bill charges that the New England Mortgage Security Company, the lender, to whom Thos. McCullough executed the mortgage to secure the loan of the money, The Corbin Banking Company, and Collier & Pinckard, the parties through whom the loan was effected, and McCullough, the borrower, all knew the pur-

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pose for which she made the deed to her father, and that it was upon no other consideration than to enable her father to effect the loan. The bill further charges that Thos. McCullough executed a second mortgage on the same lands to Collier & Pinckard, as compensation for securing the loan. The bill charges that the New England Mortgage Security Company well knew that the arrangement "was an attempted evasion of the laws of the State of Alabama which prohibited the mortgaging of the statutory separate estate of a married woman," and in the manner adopted attempted to do "indirectly what could not be done directly."

The New England Mortgage Security Company answered the bill, denying the averment, that the Corbin Banking Company and Collier & Pinckard, or either, in any manner was their agent, or represented them in any respect, in effecting the loan; that the Corbin Banking Company submitted to them in the regular course of business the security offered, and being satisfied from an examination made by its own agent and attorney, agreed to loan and did loan the entire amount of money expressed in the note and mortgage executed to it by Thomas McCullough. It denied having any knowledge of the purpose for which complainant executed the deed to her father, or that the consideration expressed in her deed, to-wit, \$1,800, was not a true and *bona fide* consideration; denied having any knowledge of or interest in the second mortgage executed by McCullough to Collier & Pinckard.

The answer of the Corbin Banking Co., and the answer of Collier and of Pinckard, accord with the answer of the New England Mortgage Security Company, in the respects stated above.

The New England Mortgage Security Company foreclosed its mortgage under a power of sale, contained in the mortgage, and executed a deed to the purchaser. The bill prays for a cancellation of the deed to McCullough, the deed to the purchaser at foreclosure sale, and the mortgages to the lender, and to Collier & Pinckard. At the final hearing upon the pleadings and evidence the complainant's bill was dismissed out of court.

It can not be seriously contended, under the proof, that the New England Mortgage Security Company had any actual notice, or information of facts which would have led to a knowledge of the fact, that the deed executed by complainant to Thos. McCullough was not a *bona fide* deed, founded upon a valuable consideration. The contention is that the Corbin Banking Company, and Collier and Pinckard

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were agents of the New England Mortgage Security Company, and thereby in law it became chargeable with notice of all the facts known to their agents. Ordinarily this is true. Suppose, however, the proof shows, as the testimony on the part of the complainant strongly tends to show in this case, that complainant and her father, and the agents (who are presumed to know the law) of the principal, agree to perpetrate a fraud on the principal, and, in pursuance of this agreement, the wife executed the deed to her father. Having succeeded in their unlawful purpose, so far as to obtain the money from a principal in fact innocent of their unlawful purpose, will she and her father (who evidently is the mover in this proceeding), be allowed to come into a court of equity, and take advantage of their own fraud, and strip the innocent lender of his security?—See *Saint et al. v. Wheeler & Wilson*, 95 Ala. 362; 10 So. Rep. 539.

We need not decide this question. The evidence is overwhelming and of such a character as to leave no doubt, in the mind of the court, that as to the loan by the New England Mortgage Security Company, that neither the Corbin Banking Company, nor Collier & Pinckard, whether acting separately or together, were the agents of the lender. The evidence shows conclusively, that all the transactions with Thomas McCullough, and his daughter, in the preparation of the security upon which it was intended to secure or effect a loan, was matter of contract or agreement between themselves. That having prepared the security, it was then submitted by the Corbin Banking Company to persons and corporations engaged in the business of loaning money. That upon its merits, it was submitted to the New England Mortgage Security Company, and, after careful examination, was accepted by it. We agree with the chancellor, in his conclusion, that neither the Corbin Banking Co. nor Collier & Pinckard acted as the agents of the New England Mortgage Security Company, in obtaining the loan, that it had no notice of any fact sufficient to charge it with a knowledge of the real consideration of the deed to Thomas McCullough, or the purpose for which it was executed. In so far as the decree, dismissing complainant's bill, affects the New England Mortgage Security Company, it is affirmed.

If at any time prior to the final hearing, or at the final hearing, complainant had amended her bill, by striking out the New England Mortgage Security Company, and upon proper averments had prayed for relief only as against Thos. McCullough, and the mortgagees and holders of the second mortgage, a different case would be before us for considera-

[Hammett et al. v. Stricklin.]

tion. There is such a variance between the allegations of the bill as it stands, and a bill with the averments suggested and prayer, that a court could not, having proper regard to the rules of practice and pleading which govern in chancery proceedings, grant relief against Thomas McCullough and the second mortgage in the present condition of the pleadings. We express no opinion upon the weight of the testimony in respect to the holders of the second mortgage. We think, however, the bill should have been dismissed without prejudice as to complainant's right to relief as against Thomas McCullough and the second mortgage.

As thus modified the decree of the Chancery Court is affirmed.

Hammett et al. v. Stricklin.

Bill in Equity to enforce Vendor's Lien.

1. *Vendor's lien; waiver by recital in note for purchase-money.*—Although a purchaser's note, with surety, recites that it was given for the purchase-money of land, the vendor's lien is waived if this recital is made as a mere inducement to an agreement, also contained in said note, that the purchaser should have the right to pay off any lien which might exist on the land, and hold the amount so paid as a set-off against said note.

2. *Misjoinder of parties defendant; by whom available.*—One who is improperly made a party defendant to a bill in equity may take advantage of the misjoinder; but if such defendant fails to object, a demurrer by a co-defendant on the ground of such misjoinder, will not be sustained.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by Matilda J. Stricklin against the appellants on December 31, 1892, and sought the enforcement of a vendor's lien, to compel the payment of a note which had been given for a part of the purchase-money of certain lands.

The bill avers that on December 26, 1891, the complainant and her husband, George E. Stricklin, being seized of certain described property, sold and conveyed the same by warranty deed to Perry Hammett, one of the respondents; that the said purchaser paid a part of the purchase-money in cash, and gave a note, dated December 26, 1891, payable

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December 26, 1892, for the balance due of the purchase-money; and that this note was not paid at maturity, and has never been paid. This note, which is the basis of the present suit, was made an exhibit to the bill, and shows that it was executed by Perry Hammett, the purchaser, and one Louis Hammett. Perry Hammett, Louis Hammett and George E. Stricklin, the husband of the complainant, are made parties defendant. The respondents, Perry Hammett and Louis Hammett, demurred to the bill on the grounds, that there was a misjoinder of parties, in that said George E. Stricklin was improperly made a party defendant; and that it was shown by said bill that the complainant had waived her vendor's lien for the enforcement of the payment of said note, by reason of her having accepted the said note with Louis Hammett as surety thereon.

There was a decree *pro confesso* against the defendant George E. Stricklin. On the submission of the cause, upon the demurrer, the chancellor overruled each ground thereof. The respondents, Perry Hammett and Louis Hammett, on this appeal, taken by them, assign as error the decree of the chancellor overruling their demurrer.

BROWN & STREET, for appellant.—(1.) George E. Stricklin is improperly made a party to the bill.—Code, § 2347; *Bogan v. Hamilton*, 90 Ala. 454; *Wolfe v. Underwood*, 91 Ala. 523; *Marshall v. Marshall*, 86 Ala. 383; *Wilkinson v. May*, 69 Ala. 53.

(2.) When the vendor of lands accepts an independent security for the payment of the purchase money, *e. g.* a note with surety, this is *prima facie* a waiver and abandonment of the lien on the land.—*Foster v. Athaneum*, 3 Ala. 302; *Donegan v. Hentz*, 70 Ala. 437; *Tedder v. Steele*, 70 Ala. 347; *Walker v. Struve*, 70 Ala. 167; *Wulker v. Carroll*, 65 Ala. 61; *Woodall v. Kelly*, 85 Ala. 368; *Ramage v. Towles*, 85 Ala. 588; *Chapman v. Peebles*, 84 Ala. 283.

LUSK & BELL, *contra*.—(1.) The mere taking of security for the purchase-money, by having another person, who is a stranger to the transaction, sign the note with the purchaser, is not an abandonment of the lien for the purchase-money. (2.) The misjoinder of a defendant is available only to the defendant improperly joined.—*Ware v. Curry*, 67 Ala. 274, and authorities there cited.

HEAD, J.—*Bryant v. Stephens*, 58 Ala. 636, declared the rule that a recital in a promissory note that it was given for

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the purchase-money of land therein described, created conclusively, by contract, a charge on the land for the purchase-money, in the nature of an equitable mortgage; but in the subsequent case of *Tedder v. Steele*, 70 Ala. 347, that doctrine was departed from, and subjected to modification, and the sounder and true principle was held to be that such a recital is merely a cogent fact indicating an intention not to waive or abandon the vendor's lien, but to retain it; and it was held that the fact was so cogent and the presumption so strong as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase-money. Grave doubts even of the correctness of the modified view were entertained by all the judges; but nevertheless it was so held, and has been recognized in a later decision of this court.—*Chapman v. Peebles*, 84 Ala. 283. The note, upon which the lien of a vendor is sought to be enforced in the present case, has upon it a personal surety, which fact evidences a waiver of the lien, unless that result is repelled by the recital found in the note in the following words: "This note is given for part purchase-money of land this day purchased from George E. Stricklin and wife, and it is expressly understood that I shall have the right to pay off any lien that may exist on said land which the said Stricklin may have failed to remove, and the amount so paid shall be a good off-set against this note." We can not resist the conclusion that the sole purpose of the insertion of this clause was to provide, by express agreement, for the right of the principal maker to pay off any lien which might exist on the land, and hold the amount so paid as a set-off against the note. The recital that the note was given for the purchase-money of land was mere inducement to that agreement. No idea of the creation or retention of a security by way of vendor's lien is involved in such a provision as that contained in the note. Security was otherwise provided, viz.: by requiring a personal surety. The clause having on its face so plain a purpose to be accomplished, it can not be said to have been inserted for any other purpose. We are of opinion the chancellor erred in holding otherwise. There is nothing in the other ground of demurrer insisted on in the argument of appellant.—*Ware v. Curry*, 67 Ala. 274.

Reversed and remanded.

[Lienkauff & Strauss et al. v. Tuscaloosa Sale & Advancing Co.]

Lienkauff & Strauss et al. v. The Tuscaloosa Sale & Advancing Company.

Summary Proceeding against Sheriff.

1. *Motion docket; no part of a record.*—A motion docket is no part of a record proper of the Circuit Court, and proceedings shown by it can only become so by being enrolled as matter of record, or by bill of exceptions.

2. *Appeal dismissed.*—When a transcript in this court does not contain the judgment appealed from, and only discloses proceedings which were never entered on the records of the trial court, the appeal must be dismissed.

APPEAL from Circuit Court of Tuscaloosa.

Tried before Hon. S. H. SPROTT.

The proceedings in this case arose out of an attachment suit brought by the appellants, Lienkauff & Strauss and Katz & Barnett, against the appellee, The Tuscaloosa Sale & Advancing Company. The appeal in this case is prosecuted by the plaintiffs in the lower court, who assign as error the refusal of the court to render a summary judgment against the sheriff, for failing to make the money on the judgment recovered by them.

G. W. VAN HOOSE, for appellants.

FOSTER & OLIVER, *contra*.

HARALSON, J.—In the transcript filed in this cause, a judgment does not appear to have been rendered by the court on the motion for a rule against the sheriff and his sureties.

Everything in the transcript, having any relevancy to this proceeding, appears to have been entered on and taken from the motion docket of the court, which docket, as we have before now held, is not part of the record proper of the Circuit Court, and proceedings shown by it, can only become so, by being enrolled as a matter of record, or by bill of exceptions. *David v. David*, 66 Ala. 140; *James v. Moseley*, 47 Ala. 299; *Waring v. Gilbert*, 25 Ala. 295. There is no bill of exceptions in this case. We have, therefore, before us a transcript of

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102	216
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proceedings in a matter, in which no judgment was rendered, and which proceedings were never entered, so far as we know, on the records of said Circuit Court. The appeal must, therefore, be dismissed.

Cornish et al. v. Suydam.

Action on a Building Contract.

1. *Contract modified by subsequent contract; waiver.*—When, after the execution of a contract, by which a builder is to complete a house "ready for occupancy," within 60 days from the date of said contract, according to plans which do not require the finishing of the second story and the putting on of the last coat of paint, the owner, after the expiration of the 60 days, makes another contract with said builder to do the additional work for extra compensation, he will be held to have waived the original stipulation to complete the work within the specified time, and to have substituted a stipulation for the completion of the work within a reasonable time.

APPEAL from Birmingham City Court.

Tried before the Hon. H. A. SHARPE.

This action was brought by the appellee against the appellants, to recover the amount alleged to be due upon a contract for the building of a house by the plaintiff for the defendants; and sought to fasten a mechanic's lien on the house for the amount alleged to be due under said contract. The defendants pleaded the general issue, and by special pleas sought to set-off against the demand of the plaintiff damages alleged to have been sustained by the defendants by reason of plaintiff's failure to complete the house within the time specified in the contract. To the special pleas of set-off the plaintiff filed his replication, and set up that the defendants waived their right to have the house completed within the time required by the contract originally made, by reason of having entered into another contract with the plaintiff for the finishing of the house.

The evidence as to the making of the two contracts is sufficiently stated in the opinion. The testimony, as shown by the bill of exceptions, showed that the house was not completed within 60 days from the making of the first contract; but was completed some time after the second contract was entered into. The cause was tried by the court without the intervention of a jury, and upon hearing all the

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99	620
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evidence, the court rendered judgment for the plaintiff. Defendants appeal, and assign as error the rendition of this judgment.

WADE & VAUGHAN, for appellants.

W. R. HOUGHTON, *contra*, cited *Robinson v. Bullock*, 6 Ala. 548; *Young v. Fuller*, 29 Ala. 464; *Badders & Britt v. Davis*, 88 Ala. 367; *Montanden & Co. v. Deas*, 14 Ala. 33.

McCLELLAN, J.—The contract of September 25, 1890, stipulated for the completion of the house “ready for occupancy” within sixty days from that date, that is by the 24th day of November, 1890, according to the architect’s plans and specifications. It seems that these plans and specifications did not provide for, contemplate or require the finishing of the second story of the building in respect of the plastering, casing and hanging of the doors and windows, wainscoting, &c., &c., nor that the last coat of paint of lead and oil on the whole exterior of the building should be put on by the contractor, Suydam. On November 25th, 1890, the day after the time limited in the first contract for the completion thereunder of the house, the parties entered into another contract, by the terms of which the contractor, for an additional consideration, undertook to do this plastering, casing and hanging doors and windows, wainscoting, &c., &c., in the second story; and “to paint last coat on house with lead and oil for ten (\$10) dollars extra on contract.” The contract here referred to is manifestly that of September, 1890. Nothing was said at the time of this second contract to the effect that it was a waiver of the time stipulated in the first for the completion of the house. But the trial court properly held that the second contract was itself such waiver, and that instead of the original stipulation in this regard, the effect of the last contract was to substitute a stipulation for completion within a reasonable time. It is obvious that the contract of September 25th did not provide for or contemplate the full completion of the house at all, but only to the extent covered by the specifications, which made no provision for finishing the second story or putting on the final coat of paint over the entire building. The second contract was intended to take the place of the first, in our opinion, with reference to what should be considered the completion of the building in the understanding of the parties; and being entered into after the lapse of the original sixty days limitation, and providing for additional

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work and materials thereafter to be done and supplied, thus necessitating further time for completion, the effect of it could only be to waive the original stipulation, and to leave in the place of it an obligation on the contractor to complete the house within the specifications referred to in the first contract, as added to by the second, in a reasonable time after November 25th, 1890; and this conclusion is aided by reference to the last clause of the second contract which provides for an extra payment under the first contract, and whereby in effect the defendant, after he knew there would be a forfeiture by the terms of that contract, which if he insisted upon it would reduce the original contract price, agreed to pay the price so stipulated and ten dollars extra thereon. Of course the parties had a right to alter and modify the original contract and to make the second one by mutual consent and without any new consideration, and by such alteration or new agreement either expressly or impliedly to waive any right either would otherwise have had. *Robinson v. Bullock*, 63 Ala. 548; *Young v. Fuller*, 29 Ala. 464; *Badders & Britt v. Davis*, 88 Ala. 367.

We see no reason to disturb the conclusions of the trial judge on questions of fact which arose on the trial.

The judgment is affirmed.

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Cartwright v. Bamberger, Bloom & Co.

Bill in Equity to Set Aside an Attachment on the Ground of Fraud.

1. *Fraudulent attachment.*—In a suit in equity to set aside an attachment of an insolvent debtor's stock of goods as fraudulent, the evidence showed that the attaching creditor was the debtor's head clerk, and held claims against him for money loaned and balance of salary, amounting to \$2,959; that the attaching creditor procured the transfers to him of claims against the insolvent debtor from a bank, the debtor's mother, and his prospective brother-in-law, aggregating \$6,380, for which he gave his notes; that the debtor was instrumental in having the transfers made by his mother and his prospective brother-in-law to the attaching creditor after the latter had threatened to attach; and that on the same day these transfers were made the creditor sued out an attachment for the aggregate of the claims transferred to him and his individual claim against the debtor. There was direct evidence tending to show that these claims were just, and that the attachment was in good faith, while there was

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nothing to impeach the transaction but the unusual and suspicious circumstances. At the sale the attaching creditor bought in the whole stock for 60 cents on the dollar. There was no positive evidence that the attaching creditor had any available means with which to make the said purchase, except the \$2,959 due him from the insolvent debtor, and the other claims transferred to him. *Held*, that the attachment should not be set aside as fraudulent and collusive. (STONE, C. J., dissenting.)

APPEAL from Decatur City Court, in Equity.

Heard before the Hon. W. H. SIMPSON.

The bill in this case was filed on March 5, 1890, by the appellees, Bamberger, Bloom & Co., against Herbert Cartwright, I. Pinkus and S. P. Ryan, the sheriff who levied the attachment. The purpose of the bill, as shown by its prayer, was to have set aside, as collusive, fraudulent and void, an attachment issued from the City Court of Decatur, at the instance of Herbert Cartwright against I. Pinkus & Co., which attachment was sued out on March 3, 1890, and levied upon the stock of goods of said I. Pinkus & Co., and that the sheriff be restrained from disposing of the proceeds of said property in payment of the alleged indebtedness claimed in said attachment proceedings. The facts of the case are set forth at length in the opinion.

On the final hearing of the cause, upon pleadings and proof, the judge, sitting as chancellor, declared that the said attachment was fraudulent and collusive, and decreed that the same be set aside, vacated and annulled. The defendants appeal, and assign as error this final decree.

R. A. McCLELLAN and KYLE & SKEGGS, for appellants.—(1.) The case at bar is governed by the same rules and principles of law as if it were charged in the bill that the fraudulent conveyance had been executed by I. Pinkus & Co. to Herbert Cartwright.—*Cartwright v. Bamberger, Bloom & Co.*, 90 Ala. 405. (2.) There is a distinction to be observed in considering the issues in this cause. If the consideration of the conveyance (in this case the attachment) be a past *bona fide* indebtedness, and the property conveyed (attached) be not unreasonably disproportionate in value to the amount of the debt, and no benefit is reserved to the grantor, I. Pinkus & Co., then the intent of the grantor or grantee, whether it be fraudulent or not fraudulent, or whether the grantee, Cartwright, had notice of or participated in the fraud or not, if there was fraud, is entirely immaterial.—*Crawford v. Kirksey*, 55 Ala. 293; *Carter Bros. & Co. v. Coleman*, 82 Ala. 177; *Levy & Co. v. Williams*, 79 Ala. 175-6; *Carter v. Coleman*, 84 Ala. 256; *Hodges v. Coleman*, 76 Ala.

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119; *Wood v. Moore*, 84 Ala. 253; *Mobile Savings Bank v. McDonnell*, 89 Ala. 441; *Harmon v. McRea*, 91 Ala. 401; *Harris v. Russell*, 93 Ala. 59. (3.) If the conveyance (attachment) be upon a new consideration, then the motives, intent and knowledge of the parties become material, and are a proper subject of investigation and consideration.—*Dollins v. Pollock*, 89 Ala. 351; *Meyer v. Sulzbacher*, 76 Ala. 120; *Beachman v. Koch, et al.*, 92 Ala. 452; 8 So. Rep. 707; *Crawford v. Kirksey*, 55 Ala. 293; *Carter v. Coleman*, 82 Ala. 177. (4.) If L. Pinkus had anything or every thing to do with the attachment, then the preference he thus gave among his creditors falls under the general doctrine as to fraudulent conveyances as often proclaimed in this State. The doctrine is, that an insolvent debtor has a right to give preference among his creditors if his assets are not enough for all; that the debts to which preference is given shall be really due; that no benefit shall be reserved to him; and that he shall get a reasonably fair price for his assets; and in such case, the preference is valid no matter how fraudulent the intent of all the parties may have been.—*Knowles v. Street*, 87 Ala. 357; *Wood et al. v. Moore, et al.*, 84 Ala. 253; *Middleton v. Wilson & Lozano*, 84 Ala. 265; *Levy & Co. v. Williams*, 79 Ala. 176; *Chipman, Calley & Co. v. Stern & Co.*, 89 Ala. 207; *Dollins & Adams v. Pollock & Co.*, 89 Ala. 351; *Mobile Savings Bank v. McDonnell*, 89 Ala. 447; *Shealy & Finn v. Edwards*, 78 Ala. 176; *Rankin & Co. v. Vandiver & Co.*, 78 Ala. 562; *Hodge Bros. v. Coleman & Carroll*, 76 Ala. 103; *Meyer & Co. v. Sulzbacher*, 76 Ala. 120; *Harmon v. McRea*, 91 Ala. 401.

HUMES, SHEFFEY & SPEAKE, and W. R. FRANCIS, *contra*.—(1.) The existence of complainant's debt being established at the time this attachment was sued out, the burden of proof is upon defendant to establish the *bona fides* of the transaction. This fraudulent attachment stands upon the same footing as fraudulent conveyances. When a conveyance is attacked by a creditor, and he proves the existence of his debt at the time the conveyance was made, then the burden of proof is upon the grantee to prove a valuable consideration for the conveyance.—*Pollak v. Searcy*, 84 Ala. 259; *Owens v. Hobbie*, 82 Ala. 469. (2.) The Supreme Court of Alabama in the case at bar have announced that it was incumbent upon defendant to show the valuable character of the consideration for this attachment and the *bona fides* of the transactions.—*Cartwright v. Bamberger, Bloom & Co.*, 90 Ala. 405. (3.) The relation existing between Pinkus and

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Cartwright casts upon Cartwright the burden of making clearer and fuller proof than if they had not been so related.—*Pollak v. Searcy*, 84 Ala. 259. (4.) The vigilant creditor may procure the payment of his claim against an insolvent debtor by the purchase of his property, but he must not go beyond the permissive purpose of securing his own demand.—*Levy v. Williams*, 79 Ala. 171. (5.) A judgment may be obtained on an honest debt and yet if obtained for a fraudulent purpose it is void as to all whose rights are offended.—*Hubbard v. Allen*, 59 Ala. 285. (6.) The facts of this case justify the conclusion that the attachment was sued out by collusion between the attaching creditor and the insolvent debtor, and for the purpose of hindering, delaying and defrauding the debtor's other creditors.—*Stix & Co. v. Keith*, 85 Ala. 465; *Mobile Savings Bank v. McDonnell*, 89 Ala. 447; *Gainesville National Bank v. Bamberg*, 13 S. W. Rep. 959; Wait on Fraudulent Conveyances, §§ 196, 197, 201, 207.

HEAD, J.—The demurrers to the bill were determined adversely to the appellant when this cause was before us at a former term.—90 Ala. 405. We see no reason to depart from the ruling then made.

Isaac Pinkus, by the name of I. Pinkus & Co., did business, as a merchant, at Decatur, Ala., from April 7th, 1888, to March 3d, 1890. Appellant, Cartwright, was employed as chief clerk in the store from January 1st, 1888, to the latter date. On that day, March 3d, 1890, he, Cartwright, claiming to be a creditor of Pinkus in the sum of \$9,500.00, sued out an attachment against him, for that sum, on the ground that he, Pinkus, had money, property or effects liable to satisfy his debts which he fraudulently withheld; and, on the same day, the attachment was levied by the sheriff on all the goods then in the store. The goods so levied on, taken at cost, invoiced at \$12,000 to \$14,000. Two days thereafter, to-wit, March 5, 1890, appellees, Bamberger, Bloom & Co., likewise sued out an attachment against Pinkus to recover a debt owing them of \$3,893.83, and caused the same to be at once levied on the same goods. The claims of Herbert Cartwright, which his attachment seeks to enforce, consisted of an alleged claim contracted originally with him by Pinkus, amounting, at the date of the attachment, without interest, to the sum of \$2,959.40, and the claims of three other persons alleged to have been purchased by Cartwright on the day of the attachment, viz., Hannah Pinkus, the mother of Isaac, the debtor, amounting to \$2,285.71, Abe Spitzer,

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amounting to \$2,700, and the First National Bank of Decatur, amounting to \$1,400. On March 5th, 1890, complainants, appellees, filed this bill to set aside the appellant's attachment as collusive and fraudulent. The particular averment upon which the equity of the bill rests, as contained in the 6th paragraph of the amended bill, is, that if Pinkus was indebted to appellant it was only in a small sum, the amount of which is to complainants unknown; that Pinkus and appellant combined and confederated to procure from the mother of Pinkus and from one Abe Spitzer, the intended brother-in-law of Pinkus, a transfer of the claims held by them, respectively, against said Pinkus, to enable said Cartwright to procure an attachment against the property of Pinkus for the purpose thereby of hindering, delaying and defrauding the other creditors of Pinkus, and that said alleged claims of the mother and of Spitzer were and are simulated and fraudulent. It is alleged generally, in the original bill, that the claim upon which Cartwright's attachment was issued was simulated. The insolvency of Pinkus, and appellant's knowledge thereof, at the time of the purchase of these claims by Cartwright and the issuance of his attachment, are averred. Appellant's answer fully denies all the charges of fraud and collusion; alleges the *bona fides* of all his asserted claims, as valid subsisting demands owing by Pinkus, and sets forth the consideration of each debt, when contracted and how evidenced. He admits he knew Pinkus was indebted, but denies that he was fully informed of the amount of his indebtedness.

Thus we see, the important and controlling inquiry is, whether or not appellant's claims were all just and subsisting debts owing by Pinkus at the time the attachment was sued out. We will examine each of them in the light of the evidence.

1. It is not denied, but conceded, that the claim of the First National Bank of Decatur was and is valid, and was purchased by and transferred to appellant on the day of the attachment.

2. Appellant's own claim. This claim, amounting to \$2,959.40, is evidenced as follows: Two promissory notes made by Pinkus to appellant, the one on May 22, 1889, for \$1,000, payable one day after date, and the other on the next day, May 23, 1889, for \$1,250, payable Jan. 1, 1890, with interest from date; and two due bills made by Pinkus to appellant, one on Nov. 16, 1889, for \$250, and the other on Jan. 1, 1890, for \$409.40. Both Pinkus and appellant testify positively and with emphasis, that the two notes and

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the due bill for \$250, were given to appellant by Pinkus, on their respective dates, for the amount of money respectively stated in each, then actually loaned to Pinkus by appellant; and that each of said notes and due bill were actually due, owing and unpaid to appellant on March 3d, 1890, when the attachment was sued out. On the first of January, 1889, appellant entered the service of Pinkus as a clerk, at a salary of \$100 per month, and continued therein until he sued out the attachment. Both he and Pinkus testify that on January 1st, 1890 they had a settlement on account of salary, and ascertained a balance in appellant's favor, for the preceding year's work, of \$409.40, and that the due bill of that date and amount was given therefor, and was actually due and owing on March 3d following. Pertinent to the validity of these claims is the inquiry, what were appellant's means and ability to make these alleged loans? It is shown that on May 9th, 1887, appellant being then not quite twenty years of age, but having had his disabilities of infancy removed, M. T. Cartwright, his father and legal guardian, made final settlement of his guardianship in the Probate Court of Morgan county, Alabama, wherein a balance of \$2,313.19 was ascertained in appellant's favor, and the same was then paid to him. These facts are shown by a certified copy of the settlement, as well as by the testimony of M. T. Cartwright and appellant. Appellant testifies that this was the money he loaned to Pinkus; that before loaning it he kept it, the greater portion of the time, in an iron drawer in his father's safe, to which drawer he had access at all times, and carried a key to it. It was also, he says, for a time placed in the iron drawer, in connection with some deeds and mortgages of his father, and placed in the bank. He swears that this money was not invested from May, 1887, to May, 1889, and was not at any time deposited in bank to his credit. In the final account of M. T. Cartwright as guardian, he charged himself with an item: "Nov. 30, 1886. To amount from W. R. Peck on land \$1,500.00." In his deposition, in this cause, he testifies that he sold the land of his ward for \$2,200, and reported \$1,500 in his account on final settlement, and that his son afterwards collected the balance of \$700, but it nowhere appears when he collected it, or what disposition was made of it. So far as the record informs us, it may have been collected subsequent to March 3d, 1890. Speaking of the \$2,313.19 paid on the final settlement, M. T. Cartwright further testifies as follows: "I know he [his son] put the money in my safe, and I told him to use his money as he saw proper. He had most of his money in my safe

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for a year or so; he kept it in an iron drawer in the safe until I carried it to the bank and put it in the vault of the bank, and it staid there, I don't know how long. I had some notes and mortgages also in the drawer and some cash.

Herbert Cartwright put that money, I believe, in an envelope, and put it in my safe. He made no investment with this money that I know of. He did not purchase any property, that I know of, with this money. This money probably remained in my safe and private box at the bank four or five months. I went and got the box out of the bank. I wanted to get some papers, and I put the iron box back in my safe. Herbert Cartwright said to me one day that Pinkus wanted to borrow some money and asked me how I thought it would do to loan him some money. I told him that I regarded him good, that he could do as he pleased about it. I don't remember of his using it (the money) until he loaned it to L. Pinkus & Co. Hesome-times consulted me in reference to investments in real estate, &c. I believe I did advise him once to invest in bank stock here; he might have said something to me at other times, but I always told him to suit himself about investing his means." About Sept. 12th, 1888, appellant "refugeed" from the yellow fever in Decatur to Huntsville, Ala., and took a position as clerk with Campbell & Son, at \$50 per month, and continued there until January 1st, when he returned to Decatur, and took the position as clerk with Pinkus at \$100 per month. For several years just prior to going to Huntsville he lived with and clerked for his father, in Decatur. It is not shown what salary, if any, was paid him by his father, but it may be fairly assumed that he at least earned and received from his father, during that time, a living and all necessary personal expenses. His father was a business man in Decatur and was worth during all these transactions and at the time he testified, between \$25,000 and \$30,000, over all liabilities. Appellant's gross earnings due by salaries from Campbell & Co. and Pinkus from about Sept. 12, 1888, to Nov. 16th, 1889, the date of the \$250 due bill given to him by Pinkus for alleged borrowed money, amounted to \$1,175. Adding to this, his salary for November and December, 1889, \$200, the gross earnings to Jan. 1, 1890, amounted to \$1,375. Of this sum according to his claim, \$409.40 had not been paid, but was still owing him by Pinkus, and was one of the demands for which the attachment was sued out. Deducting that, and he had realized in salaries in round figures \$965, from which to defray his personal expenses,

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whatever they may have been, and supplement the fund of \$2,313.19, received from his guardian, to the extent of raising the aggregate sum of \$2,500 claimed to have been loaned to Pinkus. The evidence does not disclose any other revenue or income received by appellant, except the statement of M. T. Cartwright, above referred to, that his son collected \$700 purchase-money of land after his final settlement. Complainants drew out of the witness Littlejohn, cashier of the Decatur Bank, that appellant "is a young man of excellent business habits and good moral character," and deeming it not improbable that he lived with his father and was at slight expense, we think it not unreasonable to believe that he saved enough from his earnings to increase the sum of \$2,313.19, if he kept that on hand as claimed, to \$2,500, the amount claimed to have been loaned to Pinkus.

3. The Spitzer claim. Mr. Spitzer was engaged in the liquor saloon business during the year 1889 in Decatur, Birmingham, Montgomery and Mobile, owning a one-half interest in the saloons in Decatur, Birmingham and Montgomery, and the whole interest in Mobile. He was connected with J. M. Friedman, in Decatur, up to the latter part of that year, when he had a settlement with Friedman, and thereafter retained only a small interest in the business. He had previously, in June of that year, made a settlement with Friedman, but the business continued on until the end of the year. During that year he travelled from one of the above named places to another, with headquarters at Mobile, and visited Decatur often. The business in Decatur was carried on in the name of J. M. Friedman. It is not shown in whose names they were carried on in Birmingham and Montgomery. In each of the several business concerns (saloons), there was carried a stock and fixtures worth about \$1,500, which were increased as the business justified. When asked the question, he testified that he did not owe anything on these establishments on the first of July, 1889, as he bought for cash. He testified further that he kept a bank account in San Antonio, Texas, in 1889, with Morris Friedman, and also a bank account with either the First or Second National Bank of Mobile, in 1889, he did not remember which. At a later period in his examination he stated that he had his bank book of the Mobile Bank, at Augusta, Ga., and would send it to the commissioner to be attached to his deposition. A copy of it appears in the record and is treated by the parties as a part of this witness's deposition. It shows the witness's accounts with the First National Bank of Mobile, opening May 1, 1889, and ending Dec. 31, 1889, and discov-

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ers average deposits of about \$1,200 per month against which were checks leaving small balances in depositor's favor, each month, with a balance at the end of the year of \$1,494.97. The San Antonio bank account is not before us. Spitzer testified that as his money accumulated in the Mobile bank he drew it out and sent it to San Antonio for investment; and every time he got \$500 he sent it off; that during the year 1889 he kept some of his money deposited in bank and some he did not, as he did a loaning business. He stated that his earnings in Mobile for the first six months were \$5,000 clear; that he was worth in 1889 between \$15,000 and \$17,000, over and above all incumbrances. At the time of the transaction in question, Spitzer was an intimate friend of Pinkus and was engaged to be married to the latter's sister. This is a brief resume of his financial status, and personal relations to Pinkus, as taken from his deposition. His claims against Pinkus transferred to Cartwright are as follows: Aug. 7, 1888, due-bill made by Pinkus to J. M. Friedman for \$250, on which was due a balance of \$175, transferred by Friedman to Spitzer, and for which Pinkus gave Spitzer his note Jan. 1, 1889; Jan. 8, 1889, one day note of Pinkus to Spitzer for \$735.54; June 29, 1889, same for \$1,000; July 3, 1889, same for \$500.37; Aug. 7, 1889, same for \$1,000. Total, \$3,410.91; all claimed to have been given for money loaned to Pinkus, at the times, and in sums corresponding with the respective notes. It is alleged by Cartwright that Pinkus paid on this indebtedness, on Aug. 26, 1889, \$500; that on Oct. 10, 1889, they had a settlement, when the balance due, with interest, amounted to \$3,007.55, for which Pinkus gave Spitzer his note and took up the existing notes. Early in January, 1890, as alleged, Pinkus paid on this note \$369.68, and on Jan. 18, 1-90, they had another settlement, computing interest to Jan. 13th, and ascertained a balance due Spitzer of \$2,700, for which Pinkus gave him his 90 day note for \$1,700, a due-bill for \$600, and two due-bills for \$200 each; and these are the evidences of debt which Spitzer transferred to appellant, Cartwright, on March 3d, 1890, the day of the attachment. It is also shown, incontrovertibly, that the note above mentioned for \$3,007.55 was placed by Spitzer, in December, 1889, in a bank in New Orleans, for collection, and by that bank sent to the First National Bank of Decatur for collection on Dec. 28th, 1889.

4. The Hannah Pinkus claim. We are entirely satisfied from the evidence, that Pinkus borrowed from his mother, Hannah Pinkus, in April, 1888, her part of the money re-

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ceived from insurance on the life of her husband amounting to \$2,285.71, and owed it to her on March 3, 1890. The proof, to our minds, is clear on this point, and we deem it unnecessary to point out or discuss it in detail. Her transfer to appellant passed to him a valid claim for that sum.

The main difficulty in this case, arises upon the validity of the claims of Spitzer, and the original individual claims of appellant. It is not denied that the burden of proof is upon appellant to establish their validity; nor is it denied that the relation sustained by the parties participant in the transactions under review to each other, were such as to incite one to closely scrutinize their actions and demand clearer proof of the claims they set up than would be required of persons sustaining less intimate and confidential relations. Tested by this rule, it is incumbent upon appellant to explain fully how each item of the alleged indebtedness arose, and clearly satisfy the mind of the court that it is just and valid. The production of notes executed by Pinkus does not prove their validity as against existing creditors, as appellees are shown to have been. The proof must go further and show *bona fide* consideration—that the notes are what they purport to be, real and not fictitious. Let us examine first each item of the claims of Spitzer. We will overlook the Friedman due-bill for the balance of \$175. The next item is \$735.54. As to this, Pinkus testifies, on direct examination by appellant, as follows: "The next amount that I got from Mr. Abe Spitzer was the following check of \$735.54 which was obtained from him on Jan. 8, 1889, and for which I gave him my promissory note payable one day after date with interest from date at 8 per cent per annum." He produces a note conforming to that description and appends it to his deposition. On cross examination he says: "The \$735.54 was received from Spitzer on January 8th, 1889, by him handing me a foreign check for that amount in Decatur, Ala., at my place of business. I am not sure, but I think it was in the first room up stairs over the store. I am not sure whether this amount was deposited in bank on that day. I am not sure what I did with the check; perhaps I deposited it, which I think I did, and it may have been with other amounts." Pinkus kept a bank account with the First National Bank of Decatur, a copy of which for the year 1889 and January and February, 1890, proven by the cashier of the bank, is in evidence. The account was balanced Jan. 1, 1889, and a balance in favor of Pinkus brought forward of \$1,069.61. This account shows that Pinkus deposited Jan. 10, 1889,—two days after the alleged

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loan of \$735.54,—the sum of \$1,002.54. He made six other deposits through that month averaging about \$285 each. This is all the testimony of Pinkus touching specially this particular loan. Spitzer testifies: "My next business transaction with him (Pinkus) was on Jan. 8, 1889. I loaned I. Pinkus & Co. \$735.54 by draft, he in return gave me his note payable one day after date at 8 per cent per annum." No reference is made to this particular item on cross examination.

The next loan of \$1,000, June 29, 1889: Pinkus testifies as follows: "The next amount borrowed from Abe Spitzer was \$1,000 at Decatur, Ala., on June 29, 1889. I also gave him my promissory note payable one day after date." On cross examination he stated: "On June 29, 1889, Mr. Spitzer paid me the \$1,000 in currency. At that time Mr. Spitzer came up on a visit. I don't remember how long he had been up when I borrowed the money from him. I don't remember whether I deposited this money in bank or not, but it may be that I did." His bank account shows that he deposited on that day one item of \$123, and another of \$1,000. Spitzer's testimony is as follows on direct examination: "On June 29, 1889, loaned him \$1,000 in cash, and he in return gave me his note payable one day after date with 8 per cent. interest." On cross examination he testified: "I. Pinkus made the arrangement with me at Mobile, Ala. for the loan of June 29, 1889, when he came down to Mobile to the soldier's encampment; he wanted four thousand dollars. I agreed to let him have this amount. I did not let him have any money there. It was a few weeks later after he came down there. I brought it to him. I paid him the money in cash. I drew it out of the Mobile bank in currency. The \$1,000 was all paid to Pinkus in currency. I drew this money out of the Mobile bank some time in June. I can't remember the date." In response to a question put by complainants' counsel just following the above quoted statement, inquiring how much of that \$1,000 was drawn out of the bank, and when and where did the balance come from, he replied: "I drew part of it from the bank and part of it I had at home in my safe." The witness's account with the Mobile bank shows that from June 4th, to the end of the month, he drew ten checks aggregating \$219.71, the largest of which was for \$46.08.

The next item, \$500.37, July 3, 1889: Pinkus testifies that to the best of his recollection this was a foreign check sent by Spitzer from Mobile which he endorsed to him, Pinkus, and upon which witness's indorsement appears,

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and for this loan he returned to Spitzer his promissory note, describing it. On cross examination he says: "On July 3d, 1889, Abe Spitzer paid me \$500.37 by sending me a foreign check either from Birmingham or Mobile, I don't remember which. I think I deposited that check in bank with probably other amounts." His bank account shows a deposit on that day of \$500.37. Spitzer testifies: "On July 3d, 1889, I loaned him \$500.37 by foreign check, I think."

The next item, Aug. 7, 1889, \$1,000: Pinkus testifies: "The next amount borrowed of Abe Spitzer was \$1,000, paid to me by him in currency. This was Aug. 7th, 1889, and I gave him my note as the firm of Isaac Pinkus & Co. dated Aug. 7th, 1889, payable one day after date for \$1000 for this loan." On cross examination he says: "Abe Spitzer paid me the \$1,000 on Aug. 7th, 1889, in money. I don't remember whether or not I deposited that amount in the bank at that time, but may have done so. At that time I think he, Spitzer, came up here on a visit. I don't know whether or not it was specially a business visit to me, it may perhaps have been a visit of both pleasure and business combined. I don't know, I am not sure, but we have had correspondence, and perhaps my sister also, and J. M. Friedman too in reference to that visit." Spitzer testifies: "On Aug. 7th, 1889, I loaned him \$1,000 in cash." On cross examination, he says: "I made the payment of August 7th, 1889, in cash in person. I also brought it from Mobile. I got it from the same source that I got the other. I took it in of course. I got part of it from the same bank that I got the other, and I had part of it at home. I guess I got about \$500 of it from the bank." His bank account shows no check for a space of six days prior to Aug. 7. On July 30, he is charged in his bank account with \$150.53, and on July 25, with \$1,000, and with sundry small sums on up to July 5th, when he is charged with \$500. Spitzer testifies that he had no other bank account than the First National of Mobile and Friedman's bank of San Antonio, Tex. We have no information whatever as to the state of the account in the latter bank.

This is substantially all the evidence specially touching these claims. There is much of general history shedding light upon the question of their validity, which we will narrate as briefly as possible. It can not be disputed that on March 3, 1890, and during the winter preceding, Pinkus was largely insolvent, his liabilities, according to his testimony, being nearly or quite double the value of his assets,

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and that he well knew his condition; and that failure and suspension of business in the near future were inevitable. About Feb'y 1, 1890, he boxed up and stored in the private warehouse of M. T. Cartwright near by, goods amounting to about \$2,400, according to invoice prices. On Sunday night of March 2d, following he boxed up over \$1,000 worth more of goods according to invoice price, and in the forenoon of the next day stored them in a private room up stairs in a house near by, occupied by M. B. Friedman. On January 25, 1890, Pinkus put his mother's claim in shape by executing to her his note for the money he had borrowed of her nearly two years before. On the morning of March 3, Spitzer appeared in Decatur, arriving that morning at about 2 o'clock. Appellant, Herbert Cartwright, under negotiations conceived, carried on and consummated, as claimed, by him and Pinkus, during that forenoon purchased and became the transferee of these claims of Hannah Pinkus, Spitzer and the Decatur bank, aggregating about \$6,500, by giving therefor his individual notes, except in the case of the bank, who required and obtained the suretyship of appellant's father, M. T. Cartwright. Appellant was a young man about 22 years of age, had never engaged in any business except clerkships, and had no property which the evidence shows was visible or known to Spitzer or Mrs. Pinkus, although he testified he owned certain interests in real estate and stock amounting to about \$5,000. Spitzer and Mrs. Pinkus made no inquiry of him as to what he was worth. On March 1st Pinkus sold to said M. T. Cartwright the said goods, which had been stored in the latter's warehouse on Feb'y 1st, to pay an alleged indebtedness of about \$1,800. It is claimed that these goods were winter stock and were stored in the warehouse to be carried over to the next fall and winter trade; and this claim is supported by the testimony of clerks in the store who boxed the goods and stored them in the warehouse. Moth preventives were put amongst the goods. It happened, however, afterwards, that the value of these goods was about equal to M. T. Cartwright's claims against Pinkus, and were taken as they stood in the warehouse in full payment of those claims. On the morning of March 3d, Pinkus had book accounts against his customers amounting nominally to about \$2,200, which, about ten o'clock that morning, he sold and assigned to J. M. Friedman to pay an alleged indebtedness of \$1,615 due the latter. According to the testimony of Pinkus these accounts also happened to be in value about equal to Friedman's claims.

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It appears, nevertheless, by the very positive and explicit testimony of M. T. Cartwright and Pinkus that the debt for which the goods were sold to the former was just, due and owing for house rent and borrowed money, and that the goods were not worth exceeding the amount of the debt; and the claim of Friedman, for which the book accounts were sold, is supported by the positive testimony of Pinkus, Friedman himself not being examined; and there is nothing to refute this testimony, except whatever circumstances of suspicion arise out of the general history of the case. It is not shown that appellant, Herbert Cartwright, had any knowledge of, or connection with, the transfer to Friedman. His testimony is positive that he knew nothing about it. The case shows that Pinkus participated with appellant in the negotiations and efforts of the latter to buy up the claims on which the attachment was, in part, founded; that, by arrangement between them, he went to the house to consult his mother about the transfer of her claim, while appellant went to negotiate with Spitzer and the bank, and, after stating to her the facts and circumstances which we will presently relate, advised her, that if Cartwright made her a reasonable offer, to let him have the claim. We are thus confronted with suspicions which certainly demand explanation. It is just that we set out somewhat in detail the explanation given by appellant which is substantially supported by Pinkus. It is about as follows: On Saturday night, March 1st, his father asked him how much Pinkus was owing him, and stated that he had made a settlement with him that day for the amount he was owing him, and had had some trouble in collecting his money, having to take goods in settlement, and that he, Herbert, had better see Pinkus as soon as possible and try to collect what was owing him; that he believed Pinkus was pressed; that it was unusual for a merchant carrying a large stock to sell goods to pay his debts that way; that he, Pinkus, had sold him these goods at less than cost. It was agreed between them that it would be best to see Pinkus the following Monday morning. On that morning appellant went to the store early and there found several boxes of goods boxed up, some of the goods lying on the floor between the counters and some in the aisle behind the counters where the clerks walk; he then asked Mr. Gray, one of the clerks, what those goods were doing packed up, who had packed them and when; and Gray replied Pinkus had packed them on Sunday night, and had told him it was a bill of goods to be shipped early Monday morning. When Pinkus reached the store appellant re-

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quested a settlement of him, and he replied that he had not expected to be called on for a settlement until later in the season and asked why it was requested. Appellant told him he did not wish to have out so much money unsecured. Pinkus urged appellant to wait until fall telling him he did not need the money, and appellant replied that he did need it and needed it badly, and must have it. Pinkus then said the bank was not open, but that sometime during the day, during banking hours, he would try to make arrangements to borrow enough money to pay all or nearly all of the debt. Appellant asked him to give him a check and he would hold it up until any time during banking hours to allow him to make arrangements, just so he made them that day. He refused to give the check. Appellant then went to see his father and told him what had occurred, and about the boxes of goods, and he advised that appellant go and see if Pinkus would not sell him enough goods to settle the debt, and advised attachment if he would not do it. He then went to Pinkus and requested him to sell him goods enough to pay the debt, the same as he had done his father. This Pinkus refused to do, saying the goods he had sold the father had been stored away in the father's warehouse for some time, and he would not have needed them until the next season, but if he was to sell \$3,000 worth of goods out of his stock it would cripple him so he could not pull through the season. Appellant told him if he would not do it, he would be compelled to attach him. Pinkus asked him what he had done to be attached for and threatened appellant with a suit for damages if he did attach, in reply to which appellant asked what the goods were doing packed up in the store, and when had they been packed? He replied they were packed on Sunday night, only to make room for some goods he expected to receive soon. Appellant told him he thought he knew enough to warrant attachment. Pinkus then began to beg him not to attach, saying that he could possibly borrow a thousand dollars and pay that, and if appellant would wait 60 days he thought he could pay the balance. Appellant declined to wait and Pinkus continued to beg him not to attach, saying it would ruin his business and financial reputation. Appellant still declining, Pinkus said he owed the bank in Decatur a sum of money, and his mother and also Abe Spitzer; that the bank had been kind in advancing him money; that Spitzer had been a close friend of the family, and had loaned him money on several occasions, and he felt honor bound to pay him, and that his mother had loaned him money long before to begin business on—

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money she had received for insurance on his father's life—and if he should be attached it would leave her penniless. Appellant then asked what the claims amounted to, and how evidenced, and what his stock of goods would amount to. He gave the amount of the claims and how evidenced, substantially as they have been hereinbefore described, and said the stock amounted to between \$14,000 and \$15,000. Appellant then asked if he supposed these parties would sell their claims, saying, if they would, he would buy them and attach for the whole, and he replied he did not know whether they would or not. Appellant then told him if he would see his mother, he, appellant, would see Spitzer and the bank, and if he could make satisfactory arrangements with them he would buy their claims. Pinkus said he wanted his goods to go as far towards paying his debts as possible, and appellant told him he did not believe the stock at forced sale would bring an amount more than sufficient to pay the claims mentioned and his own. Pinkus then said he would see his mother and tell her of his situation and his inability to pay her and that she might do as she pleased in the matter. Appellant went to see Spitzer and the bank, and procured their claims. Pinkus went to see his mother and told her Cartwright persisted in his purpose to attach, and that she would get nothing, and advised that if he made her a good offer to accept it. Afterwards Cartwright went to see her, and procured her claim. He then attached, procuring his father and M. B. Friedman as sureties on the attachment bond.

It has not been practicable to set out, in this opinion, all the facts of this case in detail. We have endeavored to give the leading and salient facts, which it seems to us, ought to control the decision of the cause. Upon due discussion and consideration of all the evidence, as we have been able to get it from the record, a majority of the court have reached the conclusion, that the several debts claimed by appellant are satisfactorily established, and that no just cause exists for setting aside the attachment. We will not further enlarge this opinion by stating the reasons which entered into that discussion. We simply state the facts and the conclusion upon them. The decree of the City Court is reversed, and a decree will be here entered dismissing the bill.

Reversed and rendered.

STONE, C. J., *dissenting*.—About the year 1887 Isaac Pinkus commenced business as a merchant in Decatur, Alabama. He dealt in dry goods, clothing, shoes, and, probably, other lines of trade. In 1889, and, until March 3, 1890,

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he occupied a storehouse which was the property of M. T. Cartwright, father of Herbert Cartwright. The latter, Herbert Cartwright, was born in September, 1868, and in January, 1889, he went into the service of L. Pinkus as a salesman in his store, at an agreed salary of one hundred dollars per month. He had been employed in Huntsville a part of the year 1888 at fifty dollars per month. He continued in the service of Pinkus until the goods of the latter were attached, to be shown further on. When Isaac Pinkus's stock of merchandise was attached—March 3, 1890—Herbert Cartwright was twenty-one years and six months old.

I will now proceed to state the case presented by this record, as claimed to be shown by the testimony most favorable to Herbert Cartwright:

In 1887 Herbert Cartwright was, or had been relieved of the disabilities of minority. His father had been his guardian, and then paid over to him a fraction over twenty-three hundred dollars in money. This money he kept unemployed until May, 1889, when he lent it to Pinkus. On March 3, 1890, this lent money demand had become \$2,500, and Pinkus owed Herbert on his salary a fraction over \$400. Total, \$2,900. Pinkus had also become indebted to M. T. Cartwright, father of Herbert, in about \$1,800. In this was included unpaid rent for the storehouse.

In February, 1890, Pinkus boxed up a part of his winter stock which was becoming unseasonable, and stored it in the warehouse of M. T. Cartwright. There was no concealment about this, and Herbert Cartwright had knowledge of it. These goods invoiced, at cost prices, about \$2,400. On March 1, 1890, Pinkus sold this lot of goods to M. T. Cartwright at 75 cents on the dollar of their cost price. This in payment of the rent of the storehouse, which he owed him, and in payment of other debts—the whole amounting to \$1,800. Herbert Cartwright knew of this sale, made as it was to his father.

Between the Saturday, when this sale was made to M. T. Cartwright, and the following Monday, March 3, 1890, the Cartwrights—father and son—had a conference in reference to the latter's claim on Pinkus. When Herbert reached the store Monday morning, he found some of the goods boxed up, and the boxes still in the store. Inquiring about this, he was informed by Pinkus that the object was to make room for other goods expected to arrive. It is not shown that the said Herbert had discovered that any goods had been carried out of the store, but the inference is that he had not. Herbert demanded that the \$2,900 due him be paid, and, if not paid, threatened to attach. Pinkus im-

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pledged him not to attach, as it would break up his credit and business. He informed him, too, that he, Pinkus, owed his own mother some \$2 200 or \$2,300, for borrowed money; owed Spitzer, Pinkus's prospective brother-in-law, about \$2,700, and that he owed the First National Bank of Decatur fourteen hundred dollars; all of which he desired to pay. Herbert Cartwright thereupon inquired of him if his mother, Mrs. Pinkus, and Spitzer, his friend and prospective brother-in-law, would sell their claims? Pinkus could not answer; but soon after, Cartwright was brought in contact with them, obviously through the intervention of Isaac Pinkus, and readily effected a purchase of the two claims, giving to each of them his unsecured note due at twelve months for the amount claimed to be severally due them. He also gave his note to the bank for the amount due to it, \$1,400, but was required to give his father as surety on this debt, to be paid in four months.

Having thus secured these several claims, aggregating with his own demand \$9,500, he sued out an attachment against Pinkus, and by 12:30 P. M. o'clock on Monday, March 3, had it levied on the entire stock of goods in the store, which, at cost prices, invoiced at about \$12,000 to \$14,000. The particular grounds of the attachment was that he had effects liable to the satisfaction of his debts which he fraudulently withheld.

The testimony of the two Cartwrights, father and son, proves this cash fund of twenty-three hundred dollars as belonging to Herbert, the younger. This is claimed to be the money loaned to Pinkus. Herbert testified that in March, 1890, he owned other property valued at \$1,900, but none of it was money assets, or shown to have been susceptible of conversion into money.

Cartwright, the father, testified that in March, 1890, his property was worth twenty-five or thirty thousand dollars. Of this, some seventeen thousand or more was in city real estate in Decatur. It is not shown what moneys, or money securities he held. This was the financial condition of the Cartwrights, father and son, as testified to by themselves. Pinkus is not shown to have owned any property save his merchandise, and unpaid dues for merchandise sold. He owed, in addition to the debts of which Herbert Cartwright claimed to have become the owner, some fourteen or fifteen thousand dollars, as the testimony tends to show.

One Friedman, a liquor dealer, or saloon keeper, had his place of business near to Pinkus. Pinkus, as the testimony tends to show, owed him about \$1,600. Shortly before

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Cartwright's attachment was sued out against Pinkus, he, Pinkus sold, and transferred the notes and book accounts due him, amounting to about \$2,100, in payment of said indebtedness, Friedman agreeing that if he realized from the claims more than was due him, he would pay the excess to him, Pinkus. During the night of March 1st or 2d, 1890, Pinkus took out of his store merchandise, consisting of shoes, of the invoice-cost value of about \$1,400 or \$1,500, and secreted them in the upper room of Friedman's saloon. The fact of this withdrawal and secretion, however, was not known to Herbert Cartwright, as he testifies, until after his attachment was levied. Still, Friedman became and was one of the sureties on the attachment bond of Herbert Cartwright, when he attached the goods of Pinkus March 3, 1890.

At the time Pinkus's store was broken up by Cartwright's attachment, Henry Clayburn was the porter in the store. He was made a witness by Herbert Cartwright in this suit. In his cross examination he gave this testimony: "I was usually about the store all day. The reason that I was not about the store that day, because it was late when I got there, and he told me to go to my breakfast; and when I went to breakfast, his mother told me they would not need me at the store that day. When Mr. Pinkus told me to go to my breakfast, I don't know whether he had been to his breakfast or not. I can't tell what was the usual time they had breakfast. When I first went to the store that morning I saw no one but him, Mr. Pinkus." There were no objections or exceptions to this testimony, although if objected to, the legality of what Mrs. Hannah Pinkus said to the witness is not perceived.

It is manifest the witness was speaking of what took place on March 3, 1890, the day on which the Cartwright attachment was sued out and levied. And when he was told by Pinkus to go to his breakfast, only Pinkus was there. Considered in connection with the other testimony, the conclusion is rational, if not positive, that this took place before Herbert Cartwright reached the store that morning, and consequently before he demanded his money from Pinkus, and threatened to attach him, as he testifies he did. If so, is not this a circumstance—a pregnant circumstance—tending to show that the attachment was determined on before Herbert reached the store that morning, and that Herbert and Pinkus so understood it? Else, why hurry off the porter to breakfast, and why should, or could he be told his services would not be wanted at the store that day? Does

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this not show a common understanding, a common purpose? And, in this connection, may we not inquire how it happened that Spitzer, whose business habitation was Mobile, arrived in Decatur that morning?

In giving his testimony in this case, Herbert Cartwright was interrogated as to his motive in purchasing the claims from the bank, from Mrs. Pinkus, the mother of I. Pinkus, and from Spitzer? His answer was: "By purchasing an amount of claims equal to what I thought the stock of Pinkus & Co. would bring under an attachment sale, which amount I knew would be less than the actual cost of said goods, and therein I thought would be a good opportunity for speculation.

My object in buying the claims of Mrs. Hannah Pinkus, Abe Spitzer and the First National Bank of Decatur was to get possession of the stock of goods of I. Pinkus & Co., as I had an idea of going into business for myself. I believed this was a good opportunity, and thought that I could make a thousand or so dollars by buying this stock under an attachment sale."

M. T. Cartwright, father of Herbert, gives substantially the same reason the son gave, for buying the additional claims against Pinkus. And Spitzer testified that while Herbert Cartwright was negotiating for the purchase of his claim, in reply to the inquiry why he wished to purchase, he replied, "He wanted to buy up as many claims against Pinkus as possible, so that when his stock of goods was sold under attachment, he could buy at reduced prices."

Is it not extraordinary, if Herbert Cartwright and Pinkus were dealing with each other at arm's length, as a creditor exacting payment, and a debtor imploring forbearance, that this statement should have been made by Herbert Cartwright to Spitzer?

When the goods were sold under the order of court, Herbert Cartwright became the purchaser of the stock of goods, sold in gross, at 40 per cent discount from their original cost prices. In other words, he paid sixty cents on the dollar of the sum Pinkus had paid or promised the wholesale merchants for them. They cost Herbert something over \$8,000, as I understand the testimony; but the goods which had been previously purchased by M. T. Cartwright appear to have been included in this sale. Herbert Cartwright, the purchaser, paid the purchase price, which has ever since remained in the court, subject to the final disposition of this cause. If I am mistaken in the amount thus paid into the registry of the court in the purchase of the goods, there can be no question that the sum, independent of the proceeds of

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the goods claimed to have been purchased from Pinkus by M. T. Cartwright, exceeded materially the sum of six thousand dollars. This large sum, according to the contention of appellant, was paid into court by him, when he purchased the goods, and has lain there ever since. In addition, he shows, by his own testimony, that he paid the \$1,400 to the First National Bank when it matured, and in September, 1890, settled with Mrs. Pinkus, the mother, paying her then \$2,000, the residue being remitted, in consideration of payment before maturity. He also paid Spitzer \$500 on his claim. These sums added together make a gross sum of ten to twelve thousand dollars paid out by Herbert Cartwright, and of the use of which he has been entirely deprived during all these years, while it is not shown that he has had any profitable or available use of his own means. His original claim of \$2,900 against Pinkus has been locked up in the litigation, and it is thus shown that he has had no use or control of it. From what source has he been able to meet these heavy drafts? True, he testifies that he borrowed the most of the money with which he paid for the goods which are the subject of contention in this suit; but borrowed money debts, like other debts, will mature, and, as a rule, must be provided for.

We think it clear that the debt, \$1,400, to the First National Bank, is sufficiently proved to be *bona fide*. The proof is also satisfactory that Pinkus had owed his mother about the sum claimed to have been due her. She had to be supported, however, and the conjecture would be reasonable that she had found it necessary to draw somewhat on that fund. But I do not make this a special ground for an opinion. I do, however, invite special attention to the claim of Spitzer. The proof of the *bona fides* of that debt is far from satisfactory; and the fact that he had not, when his testimony was taken, collected exceeding \$500 of the \$2,700 he claims to have sold to Herbert Cartwright, is itself a suspicious circumstance. He owed no courtesy, or forbearance, to Herbert, if, as contended for, he simply sold his claim, as a means of saving it from loss; selling it, as he did, to the man who was taking steps to bring Pinkus, his friend and prospective brother-in-law, to bankruptcy and ruin.

Let us consider another question, as shown in the testimony in this record. Herbert Cartwright, in purchasing other claims against Pinkus, assumed the burden and risk of proving those claims to be just. This, on the plain principle that dealing with a debtor in failing circumstances—known to be in failing circumstances—the law permitted

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him to use all lawful means to secure the collection of his own claim, even though in doing so he deprived all other creditors of the means of collecting their demands. But his authority extended no farther. He must simply collect his own claim, depriving the other creditors of no greater amount of the assets of their common debtor, than was reasonably necessary for such purpose. He must not secure any benefit to the debtor, and must not secure to himself any thing in excess of the sum due him. If he go beyond this permissible boundary he perpetrates a fraud. And we may take another step. The facts of this case are so extraordinary—so entirely without the routine of ordinary business transactions—that fuller and more satisfactory proof is required to uphold such transaction.—*Borland v. Mayo*, 8 Ala. 104; *Lehman v. Kelly*, 68 Ala. 192; *Lipscomb v. McClellan*, 72 Ala. 151; *Barnard v. Davis*, 54 Ala. 565; *Hubbard v. Allen*, 59 Ala. 283; *Hamilton v. Blackwell*, 60 Ala. 545; *Harrell v. Mitchell*, 61 Ala. 270; *Thomas v. Rembert*, 63 Ala. 561; *Donegan v. Davis*, 66 Ala. 362; *Tryon v. Flournoy*, 80 Ala. 321; *Gordon v. McIlwain*, 82 Ala. 247; *Shelley v. Tardy*, 84 Ala. 327; *Lehman v. Greenhut*, 88 Ala. 478; *Cartwright v. Bamberger*, 90 Ala. 405; 8 So. Rep. 264.

I trust I will be pardoned for grouping what appear to me to be the uncontroverted, salient facts of this case. A young man, just six months past the period of his majority, is the owner of \$2,900—no more—of available assets. He claims to own other property worth something less than two thousand dollars; but he furnishes neither proof nor presumption that his other property is in such shape as to be available for commercial purposes. His \$2,900 is not in his possession, but is due to him from his employer, who is a merchant, engaged in trade. Becoming alarmed for the safety of this sum of \$2,900 due from his employer, on Monday, March 3, 1890, after breakfast time on that day, as I think the circumstances show, he approaches his employer with a view of collecting or securing his claim. Is informed by Pinkus, the debtor, that the latter owes his own mother twenty-two or twenty-three hundred dollars, and to Spitzer, his friend and prospective brother-in-law, twenty-seven hundred dollars, which he desires to pay. Also, that he owes the bank fourteen hundred dollars, which he wishes to pay also. That through Pinkus, as mediator, he procures himself to be brought into communication with the mother and future brother-in-law of the latter, and purchases their claims, apparently without evidence of their *bona fides*, for their face value, promised to be paid without condition at the end of

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twelve months; that these claims are readily sold to him, Herbert Cartwright, with knowledge that the latter's object in making the purchase was to make them the foundation for an attachment against Pinkus, the son of the one and the friend of the other, by which the latter's goods were to be seized and sold at a sacrifice, and his business broken up; that, with the same end in view, he, Herbert Cartwright, purchased, at its face value, the claim of fourteen hundred dollars due from Pinkus to the bank, and secured its unconditional payment to the bank in four months. That, securing the control of these claims, he, Herbert Cartwright, sued out an attachment, charging fraud against Pinkus, and had his entire stock of merchandise seized thereunder. And, according to the testimony of Herbert Cartwright and his witnesses, all this was conceived, determined upon and executed within little, if any, more than four hours.

There are other strange features of this transaction which should not be overlooked. Friedman is shown to have been the friend of Pinkus. He permitted the latter to secrete some of his goods in his, Friedman's business house. Yet, he became one of the sureties of Herbert Cartwright on his bond for the attachment, under which the goods of Pinkus were seized. Was not this a strange spectacle? Mother and prospective brother-in-law agreeing at once to sell, and actually selling, without delay or reflection, as it would seem, claims against the son and future brother-in-law amounting to \$5,000, with the knowledge that an attachment was to be immediately issued for their collection, whereby the son and brother-in-law would be broken up; and the trusted, if not the best friend of the latter contributing to the result, by becoming surety on the attachment bond. Were not these extraordinary attendants of an attachment for the enforcement of a debt? and all the more extraordinary, when it is clearly proven that the debtor himself aided in having the transfer of the claims made, which led to the attachment?

Another circumstance should be noted. The notes, \$1,401, which Herbert Cartwright purchased from the bank, were what are known as waive notes. They expressed on their face that the debtor waived his exemptions as to personalty. The personal exemption under our statute is one thousand dollars in value, and a waiver, thus expressed, operates as a bar to such exemption, so far as the debt is concerned. Yet, although this litigation has been pending for more than three years, and although the goods attached did not sell for enough to pay what is claimed by Herbert Cartwright to

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be due him, he has taken no step to bar or cut off Pinkus's exemptions of personal property.

Nor must another important inquiry be overlooked. As I have shown, Herbert Cartwright's available effects—\$2,900—were locked up in this litigation. So has the money for which the goods were sold under the attachment been kept in the registry of the court. The money paid to the bank, to Mrs. Pinkus and to Spitzer was \$3,900. In the purchase of the goods, as the record shows, Herbert Cartwright had to pay an additional six or eight thousand dollars. Of none of this has he since had the use. In what way has he been able to command and control this large sum of money? The record does not satisfactorily inform us. It is manifest that the proof falls far short of showing that the father did or could supply the requisite funds.

I have grouped these facts because they show how utterly improbable it is that this was a simple, *bona fide* attempt by a *bona fide* creditor to collect a debt due him. They tend very strongly to show :

First, that there was collusion ; and this generates a strong suspicion that Pinkus was to be benefitted by the collection of the alleged debts to his mother and to Spitzer.

Second, that by these extraordinary proceedings, Herbert Cartwright attempted to collect, not alone the debt alleged to be due him, but a large profit beyond that, which must necessarily be at the expense of other creditors.

Third, that this transaction is surrounded by so much that is unusual—so much that is suspicious—that it should require a strong, clear showing—much more convincing than is found in this record—to uphold it against the assault of creditors.

The City Court, after what appears to have been a very careful consideration of the testimony, employed the following language, which I consider eminently just and proper:

"The complainants, having assailed the attachment for fraud and having shown to the satisfaction of the court that it was sued out in collusion with Isaac Pinkus & Co., and having proven the existence of their debt against said Isaac Pinkus & Co., at the time of the attachment, the *onus* is on defendant Herbert Cartwright to establish the *bona fides* of the several debts which constitute the consideration of his attachment ; and complainants having further alleged and shown to the court's satisfaction that said defendant was the chief clerk of said Isaac Pinkus & Co., and as such entrusted with the general supervision of the business, especially in the absence of Isaac Pinkus, and a large part of his alleged debt having been purchased from the mother

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and contemplated brother-in-law of said Isaac Pinkus, exciting just suspicion of the fairness of the transaction, he is required by the law to produce clearer and more convincing proof of the good faith of the transaction and of the adequate and valuable consideration, than if this relationship did not exist. All the facts and circumstances taken together show a collusive attachment and a conspiracy to defraud the creditors of Isaac Pinkus & Company. A collusive attachment sued out for fraudulent purposes stands upon the same footing as a fraudulent conveyance, and the defendant's measure of proof must come up to the standard the law requires in such cases.

"The court has given this case much careful and patient study, and, considering all the legal evidence submitted, the court is forced to the final conclusion that the attachment, which is here sought to be set aside, was the result or outgrowth of the unlawful combination charged in the bill; that there was no real ground for an attachment as between Herbert Cartwright and Isaac Pinkus; and that Isaac Pinkus knew of and connived at the attachment; and that it was sued out with the intent to use it to affect and prejudice the pre-existing rights of the *bona fide* creditors of said Isaac Pinkus & Company; that the *bona fides* of none of the claims going to make up the total debt of Herbert Cartwright, upon which the attachment was based, (except that of First National Bank) has been shown by the measure of proof required by law; and further that in the purchase of the claims of Hannah Pinkus and Abe Spitzer the said Herbert Cartwright went 'beyond the permissible purpose of securing his own claim,' his declared purpose being to get more than was necessary for his own indemnification; he thus 'put himself outside of the pale of the law's protection from the just demand of other creditors;' his whole and only purpose was evidently not the payment of his own debt; he went beyond the boundary of the reward and protection which the law gives the vigilant creditor. This had the effect to hinder or delay other creditors or to impair their rights. The circumstances attending the attachment were so unusual that the conclusion is irresistible that Pinkus had something to do with it, and that his purpose was to hinder or defraud his creditors; and the circumstances attending the purchase by Cartwright of the claims against Pinkus were so unusual that they show a willingness on his part to aid, and that he did aid said Pinkus in defeating any efforts that were made, or might have been made, by other creditors to obtain satisfaction of their demands."

My opinion is that the decree of the City Court ought to be affirmed.

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ACCOUNT.

1. *Account stated; presumption of its correctness.*—If an account is rendered to a debtor, and he admits its correctness, or retaining it makes no objection within a reasonable time, he will be bound by it as an account stated, his silence in the latter case being construed as an implied admission of its correctness. *Joseph. Gaboury & Co. v. Southwark Foundry and Machine Co.*, 47.
2. *Same.*—If a debtor to whom an account has been rendered objects to only one of the items thereof, he will be considered as admitting the correctness of the other items to which no objection is interposed. *Ib.* 47.

ACTION.

1. *Injuries to abutting property by building railroad in street; when action lies.*—When a corporation authorized by its charter to build a railroad along certain streets, has, in the construction of its railroad, injured property abutting on such streets, without first paying compensation for such injury, an action at law will lie for the redress of such wrong. *Highland Ave. & Belt Railroad Co. v. Matthews*, 24.
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3. *Action of trespass; what necessary to maintain it.*—The gist of an action of trespass is the injury done to the possession; and to support it, the plaintiff must show that, as to the defendant, he had, at the time of the injury, the rightful possession, actual or constructive. If the owner has parted with possession, conferring on another the exclusive right of present enjoyment, retaining in himself only a right to enter into possession at some future time, he cannot maintain trespass for an injury to property while the particular right of possession is continuing. *Ib.* 31.
4. *Note given on sale of commercial fertilizer; failure to comply with statute.*—In an action on a promissory note given for the price of a quantity of commercial fertilizer bought by the defendant, a plea averring that the sale was made in Alabama, and that the tags were not affixed to the bags when delivered, and that the sellers had not taken out a license, as required by law, (Code §§ 140-141), is a full defense to the action. *Merriman v. Knox*, 93.

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5. *By whom action may be instituted, and in what court.*—The statute imposing a penalty on foreign corporations doing business in this State, without a compliance with constitutional and statutory provisions regulating their right to do business here (S. ss. Acts 1888-7, p. 102), provides that an action to recover the penalty shall be brought in the name of the State, "by the solicitor of the circuit in which the offense is committed," but does not specify the court in which it shall be brought; and the City Court of Gadsden having all the powers and jurisdiction of a Circuit Court, while its solicitor is "charged with the performance in said court of all the duties imposed by law upon circuit solicitors;" *held*, that an action to recover such penalty may be brought in said court and by its solicitor. *Tenn. Mut. Build. & L. Asso. v. State*, 197.
6. *When action lies to charge wife's statutory estate for necessary family supplies.*—Under the statutory provisions of force in 1884-86 (Code of 1876, §§ 2711-12; Sess. Acts 1880-81, p. 36) an action at law would not lie against the personal representative of the deceased wife, to charge her statutory estate with the price of articles of comfort and support of the household furnished during coverture. *Harmon & Son v. Siler* 306.
7. *Joinder of counts for work and labor done under a contract, and for damages for breach of contract.*—When a party, under a contract, has, in part, performed his contract, and is wrongfully discharged or forced to abandon the work, he may sue upon the contract to recover the price agreed to be paid, for the work already performed, and may, in the same suit declare for damages sustained by the breach of the other party in forcing him to abandon the work before its completion; the damages thus declared for being the natural consequences of the breach complained of. *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.
8. *Action against foreign railroad company; when properly brought in this State.*—A contract of affreightment with a foreign railroad company, operating a line of its railway in Alabama, by a resident of this State for the transportation of freight from his place of residence to another State, is an Alabama contract, and an action for its breach can be brought here. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
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10. *Action on rent note; right to maintain the same.*—A vendor of leased premises, who, under an agreement with his vendee, is to retain possession of the rent notes subsequently maturing, collect them as they mature, credit the vendee with the amount collected, and account to her therefor, has no beneficial interest in such rent notes, and cannot maintain an action in his own name founded upon them.—*Moses v. Ingram*, 483.
11. *Attorney liable for money had and received.*—An attorney who has collected a certain sum of money due his client, a part of which he and his client are under obligation to pay to a third party, is responsible to said third party for money had and received,

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- to the extent of the portion to which he is entitled.—*Myers v. Byars*, 484.
12. *False representation; estoppel.*—Where one represents to another that he has money in his possession which is claimed by the latter, but says he will not pay it over until the conflicting claims thereto have been decided by the courts, and by reason of such a representation the latter is induced to institute suit for the recovery of the money, the former is estopped from saying in the action so induced that he did not, in fact, have the money. *Ib.* 484.
 13. *Contract to await result of contest.*—Where an attorney agrees or contracts to hold a certain sum of money collected for his client "to await the result of a contest as to the validity of a claim for that sum," to be instituted by a third person, an action for money had and received brought by said third person against the attorney is such a contest as was contemplated by the contract, since the client could have supervened as a claimant. *Ib.* 484.
 14. *Liability of defendants as joint tortfeasors.*—In an action against two or more defendants, seeking to hold them liable as joint tortfeasors, responsible jointly and severally for the resulting injury, the wrong complained of must, in fact, be jointly done by defendants, or if contributed to by each, a joint purpose must be imputable to each of them. *R. & D. R. R. Co. v. Greenwood*, 501.
 15. *Action for money had and received; when not maintainable.*—If, in an action to recover from a water company, as money had and received, an amount paid under protest, in settlement of a water bill, it is shown that plaintiff allowed an unnecessary waste of more water than she actually paid for, at the usual and customary rates, there is no equity in plaintiff's claim, and she is not entitled to recover.—*Capital City Water Co. v. Carey*, 539.
 16. *Action for damages; averments of complaint.*—In an action against a railroad company for injuries, alleged to have been suffered by the plaintiff while attempting to board a train by reason of a handle on one of the cars giving way, it is necessary that the complaint should aver that the plaintiff attempted to board the train at a station provided for passengers, or at a place where it is usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the car, or that he was in some manner accepted as a passenger. *North Birmingham Railway Co. v. Liddicoat*, 545.
 17. *Detinue; possession in defendant necessary to maintain action.*—To maintain an action of detinue, it must be shown that the defendant at the time the writ was sued out, had the actual possession or controlling power over the property, and the plaintiff is not entitled to recover if it should appear that the defendant was in possession of the property sued for as the bailee of the sheriff, who had levied a writ of attachment upon such property. *Kyle v. Swem*, 573.

ACKNOWLEDGMENT.

1. *Mortgage of homestead; acknowledgment by wife; conclusiveness of officer's certificate.*—When a mortgage, or other alienation of the homestead, is signed by husband and wife, and a certificate of acknowledgment, in due form, is appended by an officer authorized to take it, the certificate is conclusive as to the facts stated, unless impeached by proof of fraud or duress, in which

ACKNOWLEDGMENT—CONTINUED.

the grantee participated, or of which he had knowledge or notice before he parted with the consideration; but, if there was in fact no appearance before the officer, or no acknowledgment whatever before him, that fact may be shown in avoidance of the certificate, and it renders the instrument void, even if the grantee is a purchaser for value without notice. *Grider v. American Freehold Land Mortgage Co.*, 281; *Giddens v. Bolling*, 319.

ADULTERY. See CRIMINAL LAW, 1-2.

ADVERSE POSSESSION.

1. *Possession of land under parol gift; when adverse.*—The possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and if continued without interruption for ten years, is protected by the statute of limitations, and matures into a good title. *Lee v. Thompson*, 95.
2. *Adverse possession; recognition of donor's title.*—In order to defeat a title to land acquired by adverse possession under a parol gift, by evidence that there was a recognition by the donee of the donor's title, it must be shown that such recognition occurred before the expiration of the period necessary to perfect the donee's title by adverse possession. *Ib.* 95.
3. *Same; effect of a sale of lands under a decree.*—A defendant claiming title by adverse possession, is concluded from setting up such title, when the lands sued for were sold as a part of her donor's estate, under a decree of the Chancery Court in a cause to which she was a party, and at which sale the land was purchased by the plaintiff. *Ib.* 95.
4. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void as against the adverse possessor and the persons in privity with him, and will not support ejectment by the grantee against such adverse holder. But as to all others, and as between the parties themselves, it is valid and operative. *Pearson v. King*, 125.
5. *Right of grantee to use grantor's name in an action of ejectment.*—A conveyance of land adversely held authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property; and the grantor can not prevent such use of his name by the grantee. *Ib.* 125.
6. *Same.*—The grantor in a conveyance of land held adversely can not, by a subsequent release or conveyance to the adverse holder, or by an order to dismiss, defeat an action of ejectment brought in his name for the recovery of the land from the adverse holder, for the benefit of the first grantee. *Ib.* 125.
7. *When certificate of entry admissible to show color of title without proof of execution.*—On the trial of an issue as to adverse possession by defendant, a certificate of entry to his grantor, in connection with other evidence that he actually held possession and claimed title under it, is admissible in evidence, without proof of its execution, as color of title to fix the boundaries of defendant's possession. *Ala. State Land Co. v. Kyle*, 474.
8. *Admissibility of agreement by tenant to remain in possession.*—In ejectment where the issue is adverse possession, the defendant can prove an agreement with the tenant of his predecessor in title, by which the said tenant remained in possession as the defendant's tenant. *Ib.* 474.

ADVERSE POSSESSION—CONTINUED.

9. *Possession by tenant; presumed to be continuous.*—When after a contract of tenancy the landlord sees the tenant in possession, cultivating the land, and after an absence of nine years returns and finds the tenant still in possession, it will be presumed that the possession of the tenant under said landlord was continuous during all of that time. *Ib.* 474.
10. *Certificate of entry; extent of possession thereunder.*—Where one goes into possession of land under a certificate of entry, builds his house on one forty acres, lives in it and clears and cultivates lands lapping over into a part of his entry in another section, and during his occupancy clears portions of each forty acres embraced in the entry and gets wood and timber generally from all parts of the land, his possession extends to the whole tract, and is adverse; and this possession is not interrupted or broken by the sale of forty acres, which does not sever from the rest of the tract the forty acres on which his house is built, but leaves the latter forty still cornering with a forty unsold. *Ib.* 474.
11. *Adverse possession; must be continuous.*—Evidence that one claiming title to land leased it for one or two years to another who cut and hauled a quantity of wood from it, and that thereafter there was no other occupancy for five years, when it was again leased to another tenant, who occupied it for five years, does not show that continuous possession for ten years necessary to give title under the statute of limitations. *Ib.* 474.
12. *Adverse possession.*—Possession of land from 1851 to 1868, the holder exercising acts of ownership incident to adverse holding, can not be declared, as matter of law, to have been adverse possession, if such holder, in 1868, made admissions tending to show that his possession had been in recognition of a paramount title, and permissive under it; the character of such possession being a question determinable only by a jury. *Trufant v. White & Co.*, 526.
13. *Same; permissive possession under admitted paramount title for ten years.*—If, after adverse possession has ripened into a title, the holder thereof admits that his possession is in recognition of a paramount title, and after such admission he continues in possession permissively under this confessed paramount title for ten years, the title to said land thereby becomes divested out of him, and revested in the admitted owner. *Ib.* 526.
14. *Adverse possession after admitted permissive possession.*—If one, who has been in possession of real estate for many years, admits that such holding was in recognition of, and permissive under, a paramount title in another, his possession subsequent to such admission can not become adverse, without an open and distinct disavowal of the title of the admitted owner, and the assertion of a hostile title, involving a repudiation of the subordinate character of his former possession, brought to the actual knowledge of the true owner. *Ib.* 526.
15. *Evidence; payment of taxes.*—In determining whether the possession of certain lands by one, who admits a former permissive holding, has become adverse, evidence showing payment of taxes on said lands by said holder, and that he scheduled the said lands in a bankruptcy proceeding by him, is competent as tending to show the character of his subsequent possession. *Ib.* 526.

AGENCY.

1. *Responsibility of principal for acts of agent.*—A principal is not responsible for the malice, vexation or wantonness of an agent in suing out a writ of garnishment, unless the principal authorized, participated in or ratified such act; and such authority, participation or ratification can not be inferred from the mere relation of principal and agent, but must be proved. *Ala. State Lund Co. v. Reed*, 19.
2. *Waiver of cash payment for telegram; limitation of agent's authority.* If the agent of a telegraph company, receiving the reply message for transmission at night, promised to wait until the next morning for payment of the charge, the company can not defend an action for damages on account of delay in its transmission, on the ground that the agent had no authority to make such promise, unless it is shown that the person sending the message had notice of his want of authority. *Western Un. Tel. Co. v. Cunningham*, 316.
3. *Punitive damages.*—If the agent of a telegraph company, receiving the reply message for transmission, knew the urgent necessity for promptness in forwarding it, but delayed to send it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinces an utter disregard of the feelings and rights of the plaintiff; and if they so determine, they may award punitive damages. *Ib.* 316.
4. *Cashier of bank; notice to him is notice to the corporation.*—Notice received or knowledge acquired by the cashier of a bank, while engaged in the transaction of business, in accordance with the general usage and practice of banking institutions, and within the general apparent line of his duty and authority as cashier, is notice to and knowledge of the bank. *B'gham Trust & Sav. Co. v. La. Nat. Bank*, 379.
5. *Dealings with agent; secret instructions and limitations.*—One who deals with an agent or officer of a corporation within the scope of the apparent powers of such agent or officer, is not affected by secret instructions of the corporation to him, or secret limitations, which may have been placed upon the power of such agent. *Ib.* 379.
6. *Transfer of stock as collateral security; notice thereof.*—The power to negotiate loans being expressly conferred by charter upon a Trust & Savings Company, if the cashier of such company, in negotiating a loan for a customer, and in the course of the collection of the proceeds of such loan, acquires knowledge and receives notice of the pledge of shares of the capital stock of such company as collateral security, such knowledge and notice is imputed to the company. *Ib.* 379.
7. *Same.*—The knowledge thus imputed to the company is binding upon and controls it in subsequent transactions with such borrower, though conducted by different officers after the former cashier's death, so long as the shares of stock remain in the hands of the transferee. *Ib.* 379.
8. *Lien of a corporation on the shares of the corporation; subordinate to prior pledge.*—When a cashier of a Trust & Savings Company, in the negotiation of a loan, and the collection of the proceeds thereof, acquires knowledge and notice of the pledge of shares of its capital stock by a stockholder, such knowledge or notice is imputable to said company, and it can not under section 1674 of the Code, assert a lien on the shares of stock so pledged for the security of a debt to it, subsequently contracted by said stock-holder. *Ib.* 379.

AGENCY—CONTINUED.

9. *False issue of bill of lading by agent of railroad company; inquiry necessary by endorsee.*—When a railroad company's agent issues a bill of a lading to a fictitious firm, for goods never received, and endorses it in the name of said firm, the endorsee is put upon inquiry concerning the endorsing firm; and failing to inform himself as to whether there was such a firm, and not obtaining the endorsement from the firm to whom the bill of lading was issued, he cannot recover damages from the railroad company under section 1179 of the Code of 1886. *Jasper Trust Co. v. K. C.; M. & B. R. R. Co.*, 416.
10. *Express company; embezzlement by agent.*—Where through fraud or false pretenses of the agent of an express company, one is induced to deliver money to such express company to be carried and delivered by it to a fictitious firm, and the express company receives, gives its receipt for the money, carries it to the place of destination, and delivers it to such agent, who embezzles the money, the sender can recover the amount from the express company. *So. Express Co. v. Jasper Trust Co.*, 416.
11. *Foreign corporations; requisite authority of agents.*—The agent, which foreign corporations are required by the constitution to have at a known place of business in this State, need not be invested with any of the contractual powers which the corporation is permitted to exercise by its constating instruments, but it is sufficient if he has authority to accept and receive service of process. *McCall v. Am. Freehold Ld. Mortg. Co.*, 427.
12. *Agency; extent of authority.*—An agent, who is conducting a certain business for his principal, and as such, is authorized to purchase supplies on credit, has authority to purchase only such as are reasonably adapted to, or customarily used in a business of that kind; and it is the duty of the party selling to such agent to know that the goods sold are of such character as the nature of the business authorized the agent to purchase, and the burden is upon him to prove this fact. *Wallis Tobacco Co. v. Jackson*, 460.
13. *Stock sold on exchange; agent for seller and buyer.*—The fact that a member of the Stock Exchange, who was employed by the pledgee of stock to sell it on the Exchange, was also employed by a buyer to purchase, at a limited price, stock of the character offered by the pledgee, does not invalidate the sale effected by such member, if, in accordance with the rules of the Exchange, he procured a fellow member to make the bid, and neither the pledgee nor the purchaser had any knowledge of each other's intentions or of their instructions to their agent. *Terry v. B'gham Nat. Bank*, 566.
14. *Lender of money not chargeable with facts known to the agents of the borrower.*—One who lends money upon a mortgage on lands, regularly executed, is not chargeable with the knowledge of brokers, who negotiated the loans as the agents of the borrower, that the mortgagor's title to the said lands was acquired through a voluntary conveyance from his daughter, a married woman; the brokers not being the agents of the lender, and the lender having no knowledge or notice of the attempted evasion of the law. *Allen v. McCullough*, 612.

AMENDMENTS.

1. *Amendments to petition relate back to the time of original filing.*—The substitution of lost portions of a petition, and the allowance of amendments thereto, when lawfully granted, relate back to the

AMENDMENTS—CONTINUED.

- time the original petition was presented, and become parts of that petition as and of that date. *Ex parte Farquhar & Son*, 375.
2. *Amendment of petition*—On appeal to the Circuit Court from a judgment in the Probate Court in a condemnation proceeding, the petition can be amended so as to include more land than was included in the original petition; and both parties being before the court when such amendment was allowed, the judgment in such cause by the appellate court will not be set aside on account of such amendment. *Newton v. Ala. Midl. Rwy. Co.*, 468.

APPEALS.

1. *Parties to appeal, and practice*.—One of the next of kin who, though notified, did not appear on the contest of the probate of a will, can not sue out an appeal from the decree admitting the will to probate, nor join in an appeal sued out by the contestants; but, if he was not notified, he may propound his interest by petition to the court below, and, having then been made a party, may sue out an appeal. *Reese v. Nolan*, 208.
2. *When appeal lies, or mandamus*.—When a suit is properly dismissed at the instance of the plaintiff on the record, the remedy of a person injured thereby is by writ of *mandamus*, and an appeal does not lie. *Jennings v. Pearce*, 303.
3. *Appeal from Recorder's Court; motion to quash proceedings*.—When a person who has been arrested, without affidavit or warrant, for the violation of a city ordinance, appears before the Recorder, and without objection pleads not guilty, and is tried and fined, he is presumed to have waived the want of an affidavit or warrant of arrest; and on appeal to the City Court a motion to quash the proceedings in that court, on the ground that the prosecution was commenced without affidavit or warrant, comes too late, and is properly overruled. *Aderhold v. Mayor and City Council of Anniston*, 521.
4. *Judgment by default, without service of process*.—In an action against several defendants, one of whom is not served with process, it is error to render judgment by default against all of the defendants, and such judgment will be reversed. *Windham v. Nat. Fertilizer Co.*, 578.
5. *Same; effect of such reversal*.—The only effect of such reversal is to strike from the judgment the name of the defendant not served, it being operative as to the others. *Ib.* 578.
6. *Effect of decree on appeal; complainant estopped*.—When in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Bolling & Son v. Pace*, 607.
7. *Appeal dismissed*.—When a transcript in this court does not contain the judgment appealed from, and only discloses proceedings which were never entered on the records of the trial court, the appeal must be dismissed. *Lienkauff & Strauss v. Tuscaloosa Sale & Adv. Co.*, 619.

- ASSAULT. See CRIMINAL LAW, 3.

ASSIGNMENT.

1. *Assignment of cause of action in pending suit.*—The plaintiff in a pending suit having assigned the cause of action, or an interest therein, may afterwards dismiss the suit, unless the assignee offers to indemnify him against the costs which might be incurred by its further prosecution. *Jennings v. Pearce*, 303.

ASSIGNMENT, GENERAL.

1. *Mortgage by insolvent partnership; part of its general assignment.*—A partnership that has borrowed trust funds from one of its members, who was the receiver in a chancery cause, without giving a mortgage on real estate as required by order of court, can not, on the day of making a general assignment for the benefit of its creditors, prefer the said receiver, by giving to him a mortgage on a part of the firm's property, although in pursuance of an agreement to give such mortgage, alleged to have been entered into when the loan was made; and a mortgage given under such circumstances will be construed to be part of the general assignment. *Goldthwaite v. Ellison*. 497.

ATTACHMENT.

1. *Lien of attachments levied on same property.*—When two or more attachments are levied on the same property, but on different days, the lien of each dates from its levy, and is subordinate to those levied prior to it; and if all the suits are reduced to judgment, they must be paid in the order of their respective levies. *Bamberger, Bloom & Co. v. Voorhees. Miller & Rupel*. 292.
2. *Same; when aid of equity is invoked to set aside prior attachment as fraudulent.*—If the attachment first levied is attacked by the subsequent attaching creditors, by bills in equity on the ground of fraud and collusion between the creditor and the debtor, and decrees are obtained setting it aside on that ground, the respective liens of the complainants are not affected by the date on which their bills were filed, but are governed, as at law, by the priority of the levy of their respective attachments. *Ib.* 292.
2. *Multifariousness; misjoinder; laches in filing bill.*—When several attachments are successively levied on a stock of goods, on which a prior attachment has been levied by a person also claiming to be a creditor, and each of the subsequent creditors then files a bill in equity to set aside the prior attachment on ground of fraud and collusion between the plaintiff and the debtor; the bill of the creditor whose attachment was first levied being filed last, making the other attaching creditors parties defendant, and claiming priority of payment because his attachment was first levied; it is neither multifarious, nor demurrable for misjoinder of parties; nor is he guilty of culpable laches in not filing his bill until after the lapse of eighteen months from the levies, when it appears that the money arising from the sale of the attached goods has been retained in the hands of the sheriff under injunctions issued under the former bills, but it is suggested that the several cases be consolidated. *Ib.* 292.
4. *Lien of attachment; not affected by replevy bond.*—The levy of an attachment upon personal property creates a lien and places the property in the custody of the law; and the execution of a replevy bond by defendant in a detinue suit, who is in possession as the bailee of the sheriff, under a writ of attachment previously levied on the property sued for, neither terminates

ATTACHMENT—CONTINUED.

the lien, nor terminates the bailment so as to estop the defendant from denying his possession. *Kyle v. Swem*, 573.

5. *Fraudulent attachment*.—In a suit in equity to set aside an attachment of an insolvent debtor's stock of goods as fraudulent, the evidence showed that the attaching creditor was the debtor's head clerk, and held claims against him for money loaned and balance of salary, amounting to \$2,959; that the attaching creditor procured the transfers to him of claims against the insolvent debtor from a bank, the debtor's mother, and his prospective brother-in-law, aggregating \$6,880, for which he gave his notes; that the debtor was instrumental in having the transfers made by his mother and his prospective brother-in-law to the attaching creditor after the latter had threatened to attach; and that on the same day these transfers were made the creditor sued out an attachment for the aggregate of the claims transferred to him and his individual claim against the debtor. There was direct evidence tending to show that these claims were just, and that the attachment was in good faith, while there was nothing to impeach the transaction but the unusual and suspicious circumstances. At the sale the attaching creditor bought in the whole stock for 60 cents on the dollar. There was no positive evidence that the attaching creditor had any available means with which to make the said purchase, except the \$2,959 due him from the insolvent debtor, and the other claims transferred to him. *Held*, that the attachment should not be set aside as fraudulent and collusive. (STONE, C. J. dissenting.) *Cartwright v. Bamberger, Bloom & Co.*, 622.

ATTORNEY AT LAW.

1. *Argument of counsel to jury*.—In argument to the jury in a criminal case, counsel should not be restricted by a narrow or rigid rule, but should be allowed reasonable license in discussing the evidence and inferences to be drawn from it, but should not be allowed to state, as fact, that of which there is no evidence, and which would not be relevant evidence if offered; and if counsel are allowed to exceed this limit, against the objection and exception of the defendant, in a matter which may prejudice, it is reversible error. *Dollar v. State*, 236.
2. *Same*.—On a prosecution for selling liquor to a minor, it is not permissible for the solicitor to state to the jury, against the objection and exception of the defendant, that their town is worse cursed with the illegal sale of whiskey than any other place known to him, that they are trying to build up a school there, and that parents will not send their children to school in a place where they can get whiskey at every corner; but, the defendant's counsel having commented on the fact that solicitor's fee on a conviction for selling liquor to a minor was five times as great as on a conviction for selling without a license, the solicitor may state, in reply, that he would willingly "give up all of his fees in the liquor cases if he could put down the accursed traffic." *Ib.* 236.
3. *Guardian ad litem for infants; allowance for solicitor's fees*.—When infants are necessary parties to a chancery suit, their interests can only be represented by a guardian *ad litem*; and a person who has an adverse interest to them, however slight, can not properly act as guardian *ad litem*; and when they are not properly represented by a guardian *ad litem*, an allowance for solicitor's fees, for services rendered them, is improper and erroneous. *Parker v. Parker*, 239.

ATTORNEY AT LAW—CONTINUED.

4. *Stipulation in mortgage for payment of attorney's fees; sufficient averment of necessity for foreclosure in equity.*—When a bill, filed for the foreclosure of a mortgage, alleges that said mortgage contains no provision authorizing the mortgagee to purchase the mortgaged property, if sold under the power of sale, and that by reason of the defenses of usury and the denial of the validity of the mortgage by the mortgagor, no third person would purchase at a sale under the power, a necessity to resort to foreclosure proceedings is sufficiently shown; and attorney's fees should be allowed under a stipulation in said mortgage that the mortgagor would pay such fees "if it shall become necessary to employ an attorney to foreclose this mortgage."—*McCall v. Am. Feehold Land Mortgage Co.*, 427.
5. *Married woman relieved of the disabilities of coverture has power to contract for payment of attorney's fees.*—A married woman relieved of the disabilities of coverture by a decree of the chancellor, "so far as to invest her with the power to buy, sell, hold, convey and mortgage real and personal property," is competent to bind herself and her property by a stipulation in a mortgage for the payment of attorney's fees, and all other expenses of foreclosing the mortgage. *Ib.* 427.
6. *Attorney liable for money had and received.*—An attorney who has collected a certain sum of money due his client, a part of which he and his client are under obligation to pay to a third party, is responsible to said third party for money had and received, to the extent of the portion to which he is entitled. *Myers v. Byars*, 484.
7. *Contract to await result of contest.*—Where an attorney agrees or contracts to hold a certain sum of money collected for his client "to await the result of a contest as to the validity of a claim for that sum," to be instituted by a third person, an action for money had and received, brought by said third person against the attorney, is such a contest as was contemplated by the contract, since the client could have supervened as a claimant. *Ib.* 484.
8. *Argument of counsel to the jury.*—In an action against a railroad company to recover damages for the killing of a cow, a statement by the plaintiff's counsel in his argument before the jury, that "the witnesses were bound to testify as they did; that if they had testified differently, they would have been promptly discharged," when wholly unsupported by the evidence, is properly excluded. *Moody v. A. G. S. R. R. Co.*, 553.

BAIL. See CRIMINAL LAW, 4-9.

BANKS.

1. *Cashier of bank; notice to him is notice to the corporation.*—Notice received or knowledge acquired by the cashier of a bank, while engaged in the transaction of business, in accordance with the general usage and practice of banking institutions, and within the general apparent line of his duty and authority as cashier, is notice to and knowledge of the bank. *B'gham Trust & Sav. Co. v. La. Nat. Bank*, 379.
2. *Gifts causa mortis; savings bank book.*—A delivery by the donor to the donee of a savings bank deposit book, standing in the name of the donor, is a complete and valid gift *causa mortis* of the deposit, if such was the intention of the donor. *Jones v. Weakley*, 441.

BANKS—CONTINUED.

3. *Same; pass book of ordinary bank.*—A delivery of a pass book of an ordinary bank is not sufficient to constitute a valid gift *causa mortis* of the money on deposit, since the depositor does not, thereby, lose control over the deposit, and it was not the best available delivery of such deposit. *Ib.* 441.

BASTARDY.

1. *Local jurisdiction.*—A prosecution for bastardy (Code, § 4842), if made during the pregnancy of the complainant, must be made in the county in which she lives, or is for the time being; but, if not made until after the birth of the child, it must be made in the county in which the child was born. *State v. Woodson*, 121.
2. *Limitation of prosecution.*—Under statutory provisions (Code, § 4848), a prosecution for bastardy can not be instituted "after the lapse of one year from the birth of the child, unless the defendant has in the meantime acknowledged and supported the child." *Ib.* 201.

BILL OF EXCEPTIONS.

1. *Bill of exceptions not signed within agreed time.*—When a bill of exceptions is not signed in term time, nor within the time specified by written agreement (Code, § 2781, p. 610, note), it will be struck from the record on motion; but, if it was presented to the presiding judge within the extended period, and he failed or refused to sign it, it may be established in this court as by law provided. *Beal v. State*, 234.
2. *Signing bill of exceptions.*—A statute creating a City Court, that provides that ten days after the rendition of a final judgment in said court, such judgment shall be "as completely beyond the control of the court, as if the term of the court at which said judgment was rendered, had ended at the end of said ten days," does not limit the signing of a bill of exceptions to the ten days, next after judgment rendered in the City Court. The signing of the bill of exceptions is not a taking of control of the judgment by the court.—(*Stein v. McArdle*, 25 Ala. 561, overruled.) *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.
3. *Depositions as part of a bill of exceptions.*—Depositions taken in a cause, different from documentary evidence used on the trial, are sufficiently identified, when referred to in the bill of exceptions by the names of the witnesses; and, when being so referred to, are transcribed in the bill of exceptions, they will be considered as parts thereof. *Ib.* 331.

BILLS OF LADING.

1. *Bill of lading; right of bona fide purchaser.*—A bona fide purchaser of a false bill of lading from the person to whom it was issued by a railroad company's agent, may hold the company liable to the extent of advances made by him on such bill of lading, under section 1179 of the Code of 1886. *Jasper Trust Co. v. K. C., M. & B. R. R. Co.*, 416.
2. *Same; estoppel of carrier.*—As between a railroad company issuing a bill of lading, regular on its face, and one who shows himself to be the bona fide transferee or purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in such receipt. *Ib.* 416.
3. *False issue of bill of lading by agent of railroad company; inquiry necessary by endorsee.*—When a railroad company's agent issues a bill of lading to a fictitious firm, for goods never received, and

BILLS OF LADING—CONTINUED.

endorses it in the name of said firm; the endorsee is put upon inquiry concerning the endorsing firm; and failing to inform himself as to whether there was such a firm, and not obtaining the endorsement from the firm to whom the bill of lading was issued, he can not recover damages from the railroad company under section 1179 of the Code of 1886. *Ib.* 416.

BONDS.

1. *Replevy bond; executed by defendant in possession.*—When, under a writ of seizure in a detinue suit against several defendants, the property is found in possession of only one of them, a replevy bond by the defendant in possession as required by statute (Code, § 2717) is sufficient, without the other defendants joining therein. *Rich v. Lowenthal*, 487.
2. *Same; validity thereof.*—The fact that a part of the property sued for and included in the replevy bond is omitted from the sheriff's return of seizure, or that certain articles of property not sued for are included in the bond, can not affect the validity of such bond. The obligation of a replevy bond is to deliver as much of the property sued for and replevied as the plaintiff shall recover by verdict and judgment. *Ib.* 487.
3. *Same; penalty enforced by summary execution.*—Although the penalty of a forfeited replevy bond is less than the value of the property as assessed by the jury, it can be enforced by summary execution against the sureties for the amount of such penalty. *Ib.* 487.
4. *Lien of attachment; not affected by replevy bond.*—The levy of an attachment upon personal property creates a lien and places the property in the custody of the law; and the execution of a replevy bond by defendant in a detinue suit, who is in possession as the bailee of the sheriff, under a writ of attachment previously levied on the property sued for, neither terminates the lien, nor terminates the bailment so as to estop the defendant from denying his possession. *Kyle v. Swem*, 573.
5. *Summary execution on replevy bond; bond must be strictly statutory.* A replevy bond to justify the issuance of a summary execution upon its return as forfeited, must follow strictly the provisions of the statute. *Harrison v. Hamner*, 603.

BURGLARY. See CRIMINAL LAW, 10-13.

CARRYING CONCEALED WEAPONS. See CRIMINAL LAW, 14.

CERTIFICATE OF ENTRY.

1. *Certificate of entry; extent of possession thereunder.*—Where one goes into possession of land under a certificate of entry, builds his house on one forty acres, lives in it and clears and cultivates lands lapping over into a part of his entry in another section, and during his occupancy clears portions of each forty acres embraced in the entry and gets wood and timber generally from all parts of the land, his possession extends to the whole tract and is adverse; and this possession is not interrupted or broken by the sale of forty acres, which does not sever from the rest of the tract the forty acres on which his house is built, but leaves the latter forty still cornering with a forty unsold. *Ala. State Land Co. v. Kyle*, 474.
2. *Same; when certificate of entry admissible to show color of title without proof of execution.*—On the trial of an issue as to adverse possession by defendant, a certificate of entry to his grantor, in connection with other evidence that he actually held posses-

CERTIFICATE OF ENTRY—CONTINUED.

sion and claimed title under it, is admissible in evidence, without proof of its execution, as color of title to fix the boundaries of defendant's possession. *Ib.* 474.

3. *Evidence; admissibility of copy of certificate.*—The original of a certificate of entry, being shown to be without the jurisdiction of the court, a copy thereof, duly established by evidence as such, is admissible in evidence. *Ib.* 474.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Devise to executor in trust for special purposes, creates a personal trust; enforced by a court of equity.*—A devise to executors "hereinafter named, in trust for uses and purposes," with special directions as to the management of the testator's property and for its ultimate distribution among the devisees under the will, creates in the executor a personal trust, as distinct from executorial duties; and for the enforcement of such a trust resort must be had to a court of equity, a Probate Court having no jurisdiction over it. *Creamer v. Holbrook*, 52.
2. *Testamentary trusts; jurisdiction of Probate Court.*—A Probate Court has no jurisdiction to enforce and settle a trust created by will; but if the trust is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person, as executor and as trustee, are not so blended that they can not be distinguished or separated from each other, the Probate Court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as the trustee under the will. *Ib.* 52.
3. *Same.* When one person is appointed executor, and is also made the trustee under the will with powers unconnected with his ordinary duties as executor, the Probate Court can exercise the same control over him as an executor merely, as it could if he alone had been made the executor, and the special trust had been conferred upon some other person. *Ib.* 52.
4. *Same; jurisdiction of Chancery Court.*—If a special trust or power is attached to the executorial office, and is not personal to him who is named as executor and trustee, then the Probate Court has no jurisdiction to execute the will, as the administration of the estate under the will involves the execution of a trust, which can only be enforced in a court of equity. *Ib.* 52.
5. *Sale of decedent's lands; estoppel.*—Persons who are parties to the final settlement of an executorship are estopped, so long as such settlement remains unimpeached by direct attack, from claiming in a court of equity the same lands, from the sale of which they receive the benefit, and the proceeds of which were fully accounted for to them on such final settlement. *Ib.* 52.
6. *Forfeitures of contract; specific performance.*—Forfeitures not being favored in equity, relief by specific performance will be granted when the court can give by way of compensation all that could be justly demanded, unless the penalty is fairly proportionate to the damage suffered by the breach. *Root v. Johnson*, 90.
7. *Sale by one partner to another; adequate legal remedy.*—A sale by one partner to another of his interest in a partnership, unless it is otherwise provided by the contract of sale, operates such a change in the position of the seller that he no longer has any claim, based upon the existence of the partnership relation, which would justify an accounting between the two partners;

CHANCERY—CONTINUED.

- and the compensation agreed to be paid must be enforced at law, equity having no jurisdiction to enforce the agreement. *Brown v. Burnum*, 114.
8. *Improvements erected by surviving partner on partnership property.* If the surviving partner erects valuable improvements on real estate which belonged to the partnership, the respective interests of himself and the heirs of the deceased partner in the property may be ascertained and determined in a suit for a settlement of the partnership accounts, without a partition of the property; and he can not charge the heirs with their share of the expenses incurred in making the improvements, in the absence of an express agreement on their part, or such a course of dealing as evidences an implied agreement. *Parker v. Parker*, 289.
 9. *Jurisdiction of equity to enforce statutory lien.*—Since the passage of the act approved February 12th, 1891, as before (Code, § 3048), the statutory lien of a mechanic or material-man may be enforced by bill in equity, when the amount claimed is \$100 or more, without alleging or proving any special ground of equitable jurisdiction. *Colby v. St. James (Colored) M. E. Church*, 759.
 10. *Same.*—The jurisdiction of equity to enforce the statutory lien of mechanics and material-men (Code, § 3048), is not taken away by the later statute approved February 12, 1891; and a material-man who has obtained a judgment at law on his claim, and become the purchaser of the property at a sale under it, may come into equity against a prior mortgagee of the property who has also become the purchaser at a sale under his mortgage, to have the priorities of their respective liens adjusted, and the property sold for their satisfaction. *Birmingham Building and Loan Assn. v. May & Thomas Hardware Co.*, 276.
 11. *When aid of equity is invoked to set aside prior attachment as fraudulent.*—If the attachment first levied is attacked by the subsequent attaching creditors, by bills in equity, on the ground of fraud and collusion between that creditor and the debtor, and decrees are obtained setting it aside on that ground, the respective liens of the complainants are not affected by the date on which their bills were filed, but are governed, as at law, by the priority of the levy of their respective attachments. *Bamberger, Bloom & Co. v. Voorhees, Miller & Rupel*, 292.
 12. *Equitable relief against judgment at law, on ground of accident or mistake.*—A court of equity will not grant relief against a judgment at law, on the ground that, by accident or mistake, it was rendered for a greater amount than was due, when it appears that the defendant, when served with process, put the papers in his pocket without reading them, did not show them to his attorney, but told the attorney that he was sued for the sum which he admitted to be due and the attorney thereupon consented to the rendition of the judgment as claimed, not knowing that the amount was greater than his client admitted to due. *Slappey v. Hodge Bros.*, 300.
 13. *Bill in equity to invest legal title; want of equity.*—Where the averments of a bill, filed to invest the legal title in complainant, on the theory that he claims as the purchaser under a void sale, show that the allegations of the petition for such sale were sufficient to confer jurisdiction to order a sale, the bill is without equity, the said sale having been valid, and having invested the purchaser with the legal title. *Smith v. Brannon*, 447.

CHANCERY—CONTINUED.

14. *Injunction to prevent levy upon individual property of an execution issued upon a judgment against a partnership.*—A bill filed to enjoin a sheriff from the threatened levy upon the individual property of the members of a partnership of an execution issued upon a judgment recovered against the firm only, is without equity; a court of law being invested with full authority to prevent an abuse of its process, and being able to give ample redress. *Baldrige v. Eason*, 516.
15. *Fraudulent misrepresentations; averments in bill to rescind contract.* When a bill, filed to rescind the sale of land, on the ground of fraudulent concealments and misrepresentations, sets forth facts showing the particular concealments and misrepresentations relied on, and avers that these misrepresentations were as to matters material, and not the mere expression of opinion of the defendant, and that complainants were induced thereby to enter into the contract, its averments are sufficient in this regard to justify the relief asked. *Baker v. Maxwell*, 558.
16. *Same; executed contract can be rescinded therefor.*—A misrepresentation by one of the parties to a contract of sale, in regard to a material fact which operated as an inducement to the other party, upon which he had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, although wholly executed, if the attempt is seasonably made. *Ib.* 558.
17. *Averments of bill to rescind contract.*—A bill to rescind a contract, whereby the complainants conveyed to defendant certain lands, in consideration of the transfer to them of certain mortgages, on the ground of misrepresentation by defendant as to the title of the mortgagors to the realty, and the existence of the personalty at the time of the mortgage, need not negative the solvency of the mortgagors, nor aver that the debts secured by the mortgages were not enforceable otherwise than by the foreclosure of the mortgages. *Ib.* 558.
18. *Same.*—A bill filed to rescind a contract for fraudulent misrepresentations, which alleges that said misrepresentations were as to material facts, and were conducive to the transaction, is not demurrable on the ground that the representations were not such as the complainants had a right to rely upon, since they might, by the exercise of diligence, have ascertained their falsity. *Ib.* 558.
19. *Same; transfer to third party.*—If, in a bill to rescind a contract, whereby complainants conveyed to defendant certain land in consideration of the transfer to them of certain mortgages held by the defendant, on the ground of fraudulent misrepresentations as to the property conveyed in said mortgages, it is shown that the complainants assigned such mortgages for value and without recourse to a third person, and afterwards accepted a re-assignment without recourse on such third person, the complainants are not entitled to the relief prayed for, unless the bill further avers such facts as imposed a legal or equitable obligation on the complainants to accept such re-assignment. *Ib.* 558.
20. *Same; complainants' knowledge of the falsity of the representations.* If it is not alleged in, or inferrible from, the averments of the bill, that the complainants knew the falsity of the representations at the time of the transfer by them to such third person, they are entitled to the rescission of the contract, notwithstanding by such assignment of the mortgages, the alleged

CHANCERY—CONTINUED.

- fraud was condoned, the transaction infected by it ratified, and the complainants may have been guilty of *laches* in the institution of their suit. *Ib.* 558.
21. *Equity jurisdiction; injunction of sale under the power contained in a mortgage.*—A court of equity will enjoin a sale under the power in a mortgage, when the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose; as where, having refused repeated tenders, he files a bill to foreclose, dismisses it without prejudice when the cause was ready for hearing, and advertises the land for sale under the power in the mortgage, with the avowed purpose of compelling the payment of another claim, which is disputed. *McCalley v. Otey*, 584.
 22. *Payment of money into court not a prerequisite of a bill to redeem and to enjoin the execution of a power of sale.*—The payment of money into court is not essential to the equity of a bill filed by the mortgagor to redeem and to enjoin the execution of a power of sale, when the bill alleges a tender, several times repeated, and its refusal, and that the complainants "are now ready and willing to pay, and have been ready and willing to pay ever since" the tender. *Ib.* 584.
 23. *Bill to foreclose mortgage; when defendant not estopped by former litigation.*—A defendant in a foreclosure suit, asserting a title paramount under a mortgage, executed prior to the mortgage sought to be foreclosed, is not estopped by a decree rendered in a former suit, to which he was a party, not involving the validity of his mortgage or the property therein conveyed, in which it was decreed that the mortgage sought to be foreclosed was a valid security in the hands of the complainant. *Bolling & Son v. Pace*, 607.
 24. *Same; not affected by right to file cross bill.*—The fact that the defendant in a suit to foreclose a mortgage was a defendant in the former suit and could have propounded his interest as claimed under a prior mortgage only by a cross bill filed in such former suit, praying the foreclosure of said mortgage, does not prevent such defendant from asserting his claim under said mortgage as a defense in the subsequent suit. *Ib.* 607.
 25. *Parties to foreclosure suit; when bill should be dismissed.*—In a suit to foreclose a mortgage only those claiming title subordinate to the mortgage should be made parties, and if the answer of a defendant discloses that he relies on a paramount title, the bill should be dismissed as to him, unless the complainant is prepared to prove that such title was, in fact, acquired subsequent to the mortgage. *Ib.* 607.
 26. *Same; effect of decree on appeal; complainant estopped.*—When, in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Ib.* 607.

CHANCERY—CONTINUED.

II. PLEADING AND PRACTICE.

27. *Tender; what necessary when purchaser is a non-resident.*—When a bill is filed to redeem lands sold under a mortgage, and the purchaser is absent from the State, a tender, to be sufficient, must be made by a deposit of the money in court on the filing of the bill. *Beebe v. Burton*, 117.
28. *Parties to bill for settlement of administration.*—Infants are necessary parties to a bill which seeks a settlement of the administration of the estate of an intestate of which they are distributees, or the accounts of a partnership of which he was a member, the surviving partner being his administrator. *Parker v. Parker*, 239.
29. *Partnership property on dissolution by death.*—On the dissolution of a partnership by the death of one of the partners, the title to the personal assets devolves on the survivor, first for the payment of debts, and the residue for distribution among the next of kin; and the title to the real estate vests in the heirs, subject in equity to be converted into partnership assets, and used for partnership purposes. *Ib.* 239.
30. *Non-joinder of necessary parties.*—The non-joinder of necessary parties is available on error, or the objection may be taken by the court *ex mero motu*. *Ib.* 239.
31. *Guardian ad litem for infants; allowance for solicitor's fees.*—When infants are necessary parties to a chancery suit, their interests can only be represented by a guardian *ad litem*, and a person who has an adverse interest to them, however slight, can not properly act as guardian *ad litem*; and when they are not properly represented by a guardian *ad litem*, an allowance for solicitor's fees, for services rendered them, is improper and erroneous. *Ib.* 239.
32. *Husband and wife as parties.*—When the legal title to the homestead is in the husband, the wife can not properly be joined with him in a bill which seeks the cancellation of a mortgage of the land on the ground that it was not acknowledged by her on separate examination as by law required. *Grider v. American Freehold Land Mortgage Co.*, 281.
33. *Offer to do equity.*—When a mortgage is given for money borrowed, and the mortgagor afterwards seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest. *Grider v. Amer. Freehold Land Mortgage Co.*, 281; *Giddens v. Bolling*, 319.
34. *Multifariousness; misjoinder; laches in filing bill.*—When several attachments are successively levied on a stock of goods, on which a prior attachment has been levied by a person also claiming to be a creditor, and each of the subsequent creditors then files a bill in equity to set aside the prior attachment on the ground of fraud and collusion between the plaintiff and the debtor; the bill of the creditor whose attachment was first levied being filed last, making the other attaching creditors parties defendant, and claiming priority of payment because his attachment was first levied; it is neither multifarious, nor demurrable for misjoinder of parties; nor is he guilty of culpable laches in not filing his bill until after the lapse of eighteen months from the levies, when it appears that the money arising from the sale of the attached goods has been retained in the hands of the sheriff under injunctions issued under the former

CHANCERY—CONTINUED.

- bills, but it is suggested that the several cases be consolidated. *Bamberger, Bloom & Co. v. Voorhees, Miller & Rupel*, 292.
35. *Variance; relief can not be granted without allegations.*—Relief can not be granted for matters not alleged, although the evidence may disclose a right to recover; and hence, if, in a suit in equity to foreclose a mortgage, the individual members of a partnership are made parties defendant, but not in their partnership names, and the bill, neither in its averments nor prayer, seeks to enforce the collection of an indebtedness from said firm, a decree against the firm is erroneous, and a bill to review and annul said decree is maintainable. *Cook v. Bolling & Son*, 455.
36. *Stipulation in mortgage for payment of attorney's fees; sufficient averment of necessity for foreclosure in equity.*—When a bill, filed for the foreclosure of a mortgage, alleges that said mortgage contains no provision authorizing the mortgagee to purchase the mortgaged property if sold under the power of sale, and that by reason of the defenses of usury and the denial of the validity of the mortgage by the mortgagor, no third person would purchase at a sale under the power, a necessity to resort to foreclosure proceedings is sufficiently shown; and attorney's fees should be allowed under a stipulation in said mortgage that the mortgagor would pay such fees "if it shall become necessary to employ an attorney to foreclose this mortgage." *McCall v. Amer. Freehold Land Mortgage Co.*, 427.
37. *Married woman relieved of the disabilities of coverture has power to contract for payment of attorney's fees.*—A married woman relieved of the disabilities of coverture by a decree of the chancellor, "so far as to invest her with the power to buy, sell, hold, convey and mortgage real and personal property," is competent to bind herself and her property by a stipulation in a mortgage for the payment of attorney's fees, and all other expenses of foreclosing the mortgage. *Ib.* 427.
38. *Averments of petition to be relieved of disabilities of coverture; sufficient allegations in a bill to foreclose mortgage.*—A petition by a married woman averring that she was the owner of a statutory, separate estate, and praying her disabilities of coverture as to such estate be removed, so far as to invest her with the right to buy, sell, hold, mortgage and convey her said real and personal property, and to sue and be sued as a *feme sole*, alleges the jurisdictional facts necessary to warrant a decree relieving her of the disabilities of coverture; and a bill which avers these facts, and further avers that her husband was made a party defendant to said petition "and, in a writing signed by him and filed in said cause, gave his assent thereto," shows that a decree of the chancellor removing the disabilities of coverture, was based upon a petition which contained the requisite jurisdictional allegations. *Ib.* 427.
39. *Waiver of right to exemption; not material.*—A waiver of the right to exemption by mortgagee is immaterial when the bill to foreclose the mortgage seeks no relief dependent on or referable to such waiver. *Ib.* 427.
40. *Fraudulent misrepresentations; averments in bill to rescind contract.*—When a bill filed to rescind the sale of land, on the ground of fraudulent concealments and misrepresentations, sets forth facts showing the particular concealments and misrepresentations relied on, and avers that these misrepresentations were as to matters material, and not the mere expression of opinion

CHANCERY—CONTINUED.

- of the defendant, and that complainants were induced thereby to enter into the contract, its averments are sufficient in this regard to justify the relief asked. *Baker v. Maxwell*, 558.
41. *Same; executed contract can be rescinded therefor.*—A misrepresentation by one of the parties to a contract of sale, in regard to a material fact which operated as an inducement to the other party, upon which he had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, although wholly executed, if the attempt is seasonably made. *Ib.* 558.
 42. *Averments of bill to rescind contract.*—A bill to rescind a contract, whereby the complainants conveyed to defendant certain lands, in consideration of the transfer to them of certain mortgages, on the ground of misrepresentation by defendant as to the title of the mortgagors to the realty, and the existence of the personality at the time of the mortgage, need not negative the solvency of the mortgagors, nor aver that the debts secured by the mortgages were not enforceable otherwise than by the foreclosure of the mortgages. *Ib.* 558.
 43. *Same.*—A bill filed to rescind a contract for fraudulent misrepresentations, which alleges that said misrepresentations were as to material facts, and were conducive to the transaction, is not demurrable on the ground that the representations were not such as the complainants had a right to rely upon, since they might, by the exercise of diligence, have ascertained their falsity. *Ib.* 558.
 44. *Same; transfer to third party.*—If, in a bill to rescind a contract, whereby complainants conveyed to defendant certain land in consideration of the transfer to them of certain mortgages held by the defendant, on the ground of fraudulent misrepresentations as to the property conveyed in said mortgages, it is shown that the complainants assigned such mortgages for value and without recourse to a third person, and afterwards accepted a re-assignment without recourse on such third person, the complainants are not entitled to the relief prayed for, unless the bill further avers such facts as imposed a legal or equitable obligation on the complainants to accept such re-assignment. *Ib.* 558.
 45. *Same; complainants' knowledge of the falsity of the representations.* If it is not alleged in, or inferrible from, the averments of the bill, that the complainants knew the falsity of the representations at the time of the transfer by them to such third person, they are entitled to the rescission of the contract, notwithstanding by such assignment of the mortgages, the alleged fraud was condoned, the transaction infected by it ratified, and the complainants may have been guilty of *laches* in the institution of their suit. *Ib.* 558.
 46. *Bill in equity against a corporation; proof of service of process.* Before a decree *pro confesso* and final decree can be rendered in a suit in chancery against a corporation, proof must be made that the person upon whom, as shown by the sheriff's return, the process of summons was served, was the agent of the corporation, or occupied such other relation towards it, as justified the service upon him for the corporation. *Oranna Building Assn. v. Agee*, 591.
 47. *Bill to foreclose mortgage; when defendant not estopped by former litigation.*—A defendant in a foreclosure suit, asserting a title paramount under a mortgage, executed prior to the mortgage

CHANCERY—CONTINUED.

sought to be foreclosed, is not estopped by a decree rendered in a former suit, to which he was a party, not involving the validity of his mortgage or the property therein conveyed, in which it was decreed that the mortgage sought to be foreclosed was a valid security in the hands of the complainant. *Bolling & Son v. Pace*, 607.

48. *Parties to foreclosure suit; when bill should be dismissed*—In a suit to foreclose a mortgage only those claiming title subordinate to the mortgage should be made parties, and if the answer of a defendant discloses that he relies on a paramount title, the bill should be dismissed as to him, unless the complainant is prepared to prove that such title was, in fact, acquired subsequent to the mortgage. *Ib.* 607.
49. *Same; effect of decree on appeal; complainant estopped*.—When in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Ib.* 607.
50. *Same; not affected by right to file cross bill*.—The fact that the defendant in a suit to foreclose a mortgage was a defendant in the former suit and could have propounded his interest as claimed under a prior mortgage only by a cross bill filed in such former suit, praying the foreclosure of said mortgage, does not prevent such defendant from asserting his claim under said mortgage as a defense in the subsequent suit. *Ib.* 607.
51. *Dismissal of bill in equity*.—When the relief prayed for in a bill in equity can not be granted, but the bill can be amended so as to allow the complainant some relief, it should be dismissed without prejudice. *Allen v. McCullough*, 612.
52. *Misjoinder of parties defendant; by whom available*.—One who is improperly made a party defendant to a bill in equity may take advantage of the misjoinder; but if such defendant fails to object, a demurrer by a co-defendant on the ground of such misjoinder, will not be sustained. *Hammett v. Stricklin*, 616.
53. *Adverse possession; effect of a sale of lands under a decree*.—A defendant, claiming title by adverse possession, is concluded from setting up such title, when the lands sued for were sold as a part of her donor's estate, under a decree of the Chancery Court in a cause to which she was a party, and at which sale the land was purchased by the plaintiff. *Lee v. Thompson*, 95.

CHARGE OF COURT TO JURY.

1. *The signature of presiding judge to charges given and refused*.—The statute, (Code, § 2756), does not require the presiding judge to sign his name in full, in marking a charge "Given" or "Refused;" or to add his title to his name in such cases. *Kennedy v. Smith*, 83.
2. *Injury to credit by issuance of garnishment not recoverable*.—While the refusal of the court to instruct the jury that "Damages for injury to credit, resulting solely from the failure of plaintiff to get the amount suspended by the garnishment, are not recoverable in this suit" on the garnishment bond, may be error, it

CHARGE OF COURT TO JURY—CONTINUED.

- is not available to defendant when the complaint counts on injury done to plaintiff's credit by tying up in the hands of the garnishee the money due him, and issue is joined on such a count, and the plaintiff, without objection, introduces evidence to support it. *Ala. St. Ld. Co. v. Reed*, 19.
3. *Misleading charge*.—The taking of a non-suit is not conclusive of the fact of indebtedness *vel non*; and a charge which asserts "that the non-suit taken in the garnishment suit was not a breach of the [garnishment] bond," if not positively erroneous, is misleading and should be refused. *Ib.* 19.
 4. *Right to consider what was done in the garnishment trial*.—An instruction that "The jury can not consider for any purpose, what happened on the trial of the garnishment suit;" or that "The jury can not consider, for any purpose, the fact that the plaintiff in the garnishment suit took a non-suit," does not assert a correct proposition of law. *Ala. St. Ld. Co. v. Reed*, 19.
 5. *Charge as to sufficiency of evidence*.—A charge given in a criminal case, instructing the jury that they must render a verdict of guilty, "if they be iever from the evidence" certain facts hypothetically stated, omitting the expression "beyond a reasonable doubt," or other equivalent words, is reversible error, and it is not necessary that the defendant should ask an explanatory charge. *Pierson v. State*, 148; *Heath v. State*, 179.
 6. *Charge as to manslaughter*.—When a party is on trial for murder, it is the safer rule for the court to charge the jury as to all the degrees of homicide included in the indictment, "unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree;" but when the evidence set out in the bill of exceptions shows that the defendant, if guilty at all, is guilty of murder, the failure of the court to charge as to the constituents of manslaughter is not error. *Pierson v. State*, 148.
 7. *Charges as to sufficiency of evidence and reasonable doubt*.—A charge instructing the jury, in a criminal case, "that the innocence of the defendant should be presumed until his guilt is established by evidence in all the material aspects of the case beyond a reasonable doubt and to a moral certainty;" or, "that the evidence, to find him guilty as charged, must be strong and cogent, so strong and cogent as show his guilt to a moral certainty,"—each asserts a correct legal proposition, and its refusal is reversible error.—*Gilmore v. State*, 155.
 8. *Argumentative charge as to evidence of foot-prints*.—A charge instructing the jury, "as to foot-prints, that where no peculiar marks are observed, but the correspondence thus proved is merely in point of superficial shape, outline and dimensions, and those of the ordinary character, it may serve to confirm a conclusion established by independent evidence, but can not be in itself safely relied on, on account of the general resemblance known to exist among the feet and shoes of persons of the same age and sex," is properly refused because argumentative. *Ib.* 155.
 9. *Charge as to hypothesis of guilt*.—A charge instructing the jury that, "before they should convict the defendant, the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with all of them," asserts a correct legal proposition; but the jury should keep in mind the distinction between facts proved and matters given in evidence. *Ib.* 155.
 10. *Charge as to sufficiency of evidence in excluding probability of innocence*.—A charge which instructs the jury that the evidence in

CHARGE OF COURT TO JURY—CONTINUED.

all criminal prosecutions, "to justify a conviction, should be such as to exclude a rational probability of innocence," is inapt, confusing and misleading, and is properly refused; but a charge instructing them that they "must believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to impress the minds of the jury with such belief of his guilt, they should find him not guilty,"—is correct, and ought to be given. *Ib.* 155

11. *Charge as to sufficiency of evidence.*—A charge instructing the jury that, "no matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof which the law requires,"—is correct and ought to be given. *Ib.* 155.
12. *General charge on evidence.*—In a criminal case, when there is any conflict in the evidence, or different inferences may be drawn from it as to the defendant's intent whether honest or criminal, in the commission of the act charged, he is not entitled to the general charge on the evidence. *Sims v. State.* 161.
13. *Charge ignoring evidence of lewd character.*—A man being on trial under an indictment for living in adultery with a woman, and evidence of lewd character having been admitted without objection, a charge instructing the jury that "the fact that she has a bad character for virtue does not aid the prosecution, unless it has otherwise proved his guilt as charged in the indictment," is properly refused. *Cox v. State.* 162.
14. *Charge on part of evidence.*—A charge which, specifying one of several criminalizing circumstances in evidence, instructs the jury that it is not enough to justify a conviction, is properly refused, since it tends to mislead, and is to some extent argumentative. *Ib.* 162.
15. *Charge as to sufficiency of evidence.*—To authorize a conviction in a criminal case, the evidence must convince the jury *beyond a reasonable doubt*; and a charge which instructs them that they can not acquit the defendant, "if they believe the evidence," is reversible error. *Hooks v State,* 166.
16. *Same; abstract charge.*—A charge instructing the jury that "the mere possession of stolen goods, without other evidence of guilt, is not *prima facie* evidence of burglary," is properly refused because abstract, when there is other evidence tending to show the defendant's guilt as charged. *Hicks v. State,* 169.
17. *Same; charge invading province of jury.*—A charge instructing the jury that, "the money found on the defendant's person not being the money alleged to have been stolen, he is not required to account to the satisfaction of the jury for his possession of the money found on him at the time of his arrest," is properly refused, because invasive of the province of the jury, when there is evidence from which they may infer that some of the money was part of that stolen, and some of it procured in exchange or barter of the rest, and also other evidence of guilt. *Ib.* 169.
18. *Argumentative and abstract charges* are properly refused; and also a charge which is based, not on the belief of the jury as to the tendencies of the evidence, but on what the evidence shows, or fails to show. *Thompson v. State,* 173.

CHARGE OF COURT TO JURY—CONTINUED.

19. *Charges as to reasonable doubt and sufficiency of evidence.*—A charge requested in a criminal case, instructing the jury that they must acquit the defendant, unless the evidence satisfies them of his guilt "beyond a reasonable doubt and a moral certainty," is properly refused. *Roberson v. State*, 189.
20. *Argumentive charges* are properly refused. *Ib* 189.
21. *Abstract charges* are properly refused; and a charge requested is abstract, when it is partly based on facts, hypothetically stated, of which there is no evidence whatever. *Ib* 189.
22. *Charge as to reasonable doubt, or sufficiency of evidence.*—To justify a conviction in a criminal case, the evidence must exclude, not "every hypothesis," but every reasonable hypothesis, except that of guilt; and a charge requested, which requires that it shall exclude "every hypothesis but that of the defendant's guilt," is properly refused. *Culver v. State*, 193.
23. *Charge invading province of jury, as to sufficiency of impeaching evidence.*—A charge instructing the jury, in a criminal case, that the testimony of an impeached witness, to the effect that they would not believe another witness on oath, "is sufficient to generate a reasonable doubt of the defendant's guilt, when a conviction is dependent on the testimony of that witness, and there is no evidence in support of his testimony," invades the province of the jury, and is properly refused. *Prior v. State*, 196.
24. *Burden of proof as to cause or time of injuries; general charge on evidence.*—When the action is against the railroad company which, receiving the stock from the original company, delivered them at their destination, and counts on injuries resulting from the negligence of the defendant's servants, the *onus* is on the plaintiff to prove that the animals were in good condition when received by it; but, if the evidence is conflicting as to their condition at that time, the defendant is not entitled to the general affirmative charge. *L. & N. R. R. Co. v. Grant & Richardson*, 325.
25. *Charges to the jury; obstruction of navigable streams.*—In an action for the breach of a contract, by which the contractors are required to remove a large quantity of solid rock lying on the bank of a navigable stream, where it is shown that to blast this rock into the stream would be less expensive than to remove it elsewhere, but that such blasting into the stream might obstruct navigation, a charge that "under the law and Constitution of the State of Alabama, no one has the right to obstruct a navigable stream in the State of Alabama," is not abstract, nor is it objectionable as assuming that the blasting into the stream would necessarily obstruct navigation. *Danforth & Armstrong v. T. & C. River R. R. Co.*, 331.
26. *Same.*—A charge to the jury, that the plaintiffs in such case, in carrying out their contract, had no right to blast the rock into the river in such quantities as would obstruct the river and endanger navigation therein, is not erroneous, and should be given. *Ib* 331.
27. *Same.*—Charges that the plaintiffs could not recover any profits for rock which they had intended to blast into the river, if any, and that plaintiffs had no right to blast rock into the river, are properly refused, as assuming that to blast the rock into the river would obstruct navigation. *Ib* 331.
28. *Profits recoverable; charge to jury.*—An instruction that profits which would reasonably have been realized but for the defendant's fault, are recoverable, but not those which were speculative, con-

CHARGE OF COURT TO JURY—CONTINUED.

- tingent, probable or remote, is erroneous, in making an improper use of the word "probable;" since reasonably probable profits might be recoverable. *Ib.* 331.
29. *Same.*—A charge to the jury forbidding the recovery of profits, "Unless the jury believe from the evidence that the profits claimed are certain," is erroneous; reasonable certainty being sufficient to justify a recovery. *Ib.* 331.
30. *Charges as to injury of plaintiff.*—Where there is evidence that after the cars were uncoupled, and while plaintiff was laying the coupling pin on the draw-head of the car in front, such car overtook the detached cars, and the plaintiff's arm was caught, between the draw-heads, the request that if the plaintiff was injured by his failure to adopt the safer course, he cannot recover, is well refused, if it does not appear that he had time to comprehend the safer way and to adjust himself accordingly. *A. G. S. R. R. Co. v. Richie*, 346.
31. *Charge as to the duty of plaintiff.*—If in an action by a brakeman against a railroad company for injuries, alleged to have been received while uncoupling cars, on account of the negligence of the engineer, there is evidence from which the jury might believe that the plaintiff's danger was not obvious to him, it is error to instruct the jury, that "if the jury believe from the evidence that it was impossible for plaintiff to have done this work, without getting his arm in between the dead-woods, then the court charges the jury that he should not have done the work at all, and he cannot recover in this action, if he attempted to do the work, if it were impossible to do so, and while so engaged was injured." *Ib.* 346.
32. *Charge as to obeying the signals of the conductor.*—A charge that assumes that the engineer cannot be negligent in operating his engine, if he does so in prompt and careful compliance with the signals of the conductor, is erroneous, where an act, however performed, would be a negligent one; and it is not for the court to assume the truthfulness of the testimony of the conductor that the signal given on a certain occasion was a proper one. *Ib.* 346.
33. *Abstract, argumentative and misleading charges.*—Charges that are abstract, argumentative or misleading are properly refused. *Ib.* 346.
34. *Charge to the jury; does not assume negligence.*—An instruction to the jury that if a carrier, having undertaken to deliver live stock, failed to deliver it in a safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof is shifted to the defendant to excuse itself from negligence, is not erroneous, as assuming that the stock was shipped in a safe condition and injured during transportation. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
35. *Same.*—In an action against a common carrier for injury to live stock, alleged to have been caused by unreasonable delay in transporting the same, an instruction that, if the jury believe from the evidence the plaintiff is entitled to recover, the measure of damage is the difference in the market value of the stock, if they had been delivered without delay, and their market value after their delivery, in the condition the evidence shows they were in, is not erroneous as assuming that the stock was injured in transportation. *Ib.* 389.
36. *Charge to the jury; nominal damages.*—In an action for damages caused by negligent delay in transporting freight, a charge to

CHARGE OF COURT TO JURY—CONTINUED.

- the jury that seeks to limit the plaintiff's recovery to nominal damages, on the theory that by ordinary prudence the injury complained of could have been repaired, is affirmatively bad, if, for aught that is hypothesized in said charge the plaintiff might have been put to great trouble and expense in repairing the injury to his property caused by defendant's negligence. *Ib.* 381.
37. *Same; not disregarding testimony.*—In an action for injury to live stock, caused by delay in transporting the same, an instruction "that the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of the same to the railroad company, is ten or twelve hours," is not open to the objection that it disregards the testimony adduced in the case, that "usually stock in shipping go through very nicely in ten, fifteen or twenty hours;" the tendency of this evidence being merely to show that the stock would not be injured on a journey lasting from ten to twenty hours. *Ib.* 389.
 38. *Charges; abstract.*—A charge announcing a correct principle of law, if not applicable to the facts of the particular case, is properly refused. *Stringer v. Ala. Min. R. R. Co.*, 397.
 39. *Charge as to what is necessary for plaintiff to recover.*—A charge, which, in effect, asserts no more than that, if the plaintiff has established to the satisfaction of the jury the material averments of the complaint, he is entitled to recover, is not erroneous. *Howard v. Taylor*, 450.
 40. *Charges to the jury.*—Charges which assert that "when plaintiff and defendant each testify in a case and contradict each other on material points, and neither is corroborated by other circumstances or evidence, and are equally credible and worthy of belief, the verdict should be for the defendant," are erroneous. *Ib.* 450.
 41. *Same.*—A charge predicated on a fact unsupported by the evidence in the case is erroneous. *Ib.* 450.
 42. *Same.*—A charge which asserts that if there is "doubt and uncertainty" as to a fact which it is incumbent on the plaintiff to prove, then such fact must be regarded as not established, and the issue must be found against the plaintiff, exacts too high a measure of proof, and is erroneous. *Ib.* 450.
 43. *Trainmen's right to assume a compliance with the statute by the employees of an intersecting road.*—A charge that trainmen on one road, who have complied with the statute in approaching a crossing, may assume that trainmen on the intersecting road will also comply therewith, is not objectionable, as ignoring a duty which might have arisen after the train that complied with the statute had started, when given in connection with the further instruction, that the train that stopped had not the right to proceed over the crossing if the circumstances indicated that the other train would not stop. *R. & D. R. R. Co. v. Greenwood*, 501.
 44. *Charge invasive of jury's province erroneous.*—In an action against two intersecting railroads for injuries resulting from a collision of trains at their crossing, the alleged negligence being controverted by each, a charge asked by one of the defendants that assumes the negligence of the other, and submits to the jury only whether such negligence was the proximate cause of the injury, is erroneous, as invading the province of the jury. *Ib.* 501.
 45. *Argumentative charge.*—While argumentative charges should not be given by a court, the giving of them is not reversible error. *Trufant v. White & Co.*, 528.

CHARGE OF COURT TO JURY—CONTINUED.

46. *General affirmative charge.*—When, in an action against a railroad company to recover damages for the killing of a cow, there is evidence from which the jury could infer that defendant's employees were negligent in not averting the accident, it is error to give the general affirmative charge for the defendant. *Moody v. A. G. S. R. R. Co.*, 553.
47. *Charges; abstract and misleading.*—Charges instructing the jury that the plaintiff should not be allowed compensation for loss of time while confined to his bed, after the injury complained of, giving no reason why such compensation should not be awarded, are properly refused as abstract; and if their purpose was to raise the question of the plaintiff's minority at the time of the injury, the charges are misleading, in that, the principle of law intended to be invoked was not disclosed by the charges. *L. & N. R. R. Co. v. Davis*, 593.
48. *Charges to the jury.*—Charges that give undue prominence to certain portions of the evidence, and ignore other material facts, are properly refused. *Ib.* 593.
49. *Charges; exacting too high a degree of proof.*—To entitle the plaintiff in a civil action to recover, he must make out his case to the reasonable satisfaction of the jury; and charges, instructing the jury that if they "are in doubt and uncertainty as to whether or not the plaintiff has proven the material allegations of his complaint, they must find for the defendant, are properly refused, as exacting too high a degree of proof. *Ib.* 593.
50. *Improper charges.*—It is improper to give to the jury charges predicated upon the ignorance and incapacity of jurymen to make a calculation or render a verdict in the particular case. *Ib.* 593.
51. *Charges to the jury when there is conflict in the evidence.*—When there is conflict in the evidence, as to whether the car that collided with the car that inflicted the injury upon the plaintiff was put upon the track by means of a "running switch" or "drop switch," it is improper to charge the jury that a "running switch" was not made. *Ib.* 593.

CODE OF ALABAMA.

1. §§ 139-141. Commercial fertilizers must be tagged. *Merriman v. Knox*, 93.
2. §§ 416-27. Contest of election. *Morrow v. Russell*, 271.
3. § 1178. Warehouse receipts. *Com. Bank of Selma v. Hurt*, 180; *Com. Bank of Selma v. Lee*, 493.
4. § 1179. Issue of false bill of lading. *Jasper Trust Co. v. K. C. M. & B. R. R. Co.*, 416.
5. § 1674. Lien of corporation on its shares of stock. *Birmingham Trust & Sav. Co. v. Louisiana National Bank*, 379.
6. § 1732. Statute of frauds. *Garner v. Ullman*, 218.
7. § 1982. Contest of will; testimony to be recorded with will. *Reese v. Nolan*, 203.
8. § 1987. Notice of application to prove will. *Reese v. Nolan*, 203.
9. § 2018. Grant of letters of administration. *Winter v. London*, 263.
10. § 2104. Petition for sale of decedent's lands. *Smith v. Brannon*, 445.
11. § 2106. Petition for sale of decedent's lands. *Smith v. Brannon*, 445.

CODE OF ALABAMA—CONTINUED.

12. § 2511. Exemption of a debtor's personal property. *Kennedy v. Smith*, 83.
13. § 2521. Failure to file contest of exemptions. *Kennedy v. Smith*, 83.
14. § 2589. Action by administrator for negligent killing of his intestate. *O'Keif v. M. & C. R. R. Co.*, 524.
15. § 2590. Assuming risk of known defect. *Birmingham Railway & Electric Co. v. Allen*, 359.
16. § 2604. Judgment against partnership. *Baldrige v. Eason*, 516.
17. § 2605. Judgment against partnership. *Baldrige v. Eason*, 516.
18. § 2619. Statute of limitations of one year. *O'Keif v. M. & C. R. R. Co.*, 524.
19. § 2690. General demurrer. *Cunningham v. West. Un. Tel. Co.*, 314.
20. § 2717. Replevy bond. *Rich v. Lowenthal*, 487.
21. § 2752. Struck jury. *R. & D. R. R. Co. v. Greenwood*, 501.
22. § 2761. Signing bill of exceptions. *Beal v. State*, 234.
23. § 2766. Competency of witness as affected by conviction of crime. *Prior v. State*, 196.
24. § 2802. Objections to depositions. *Moody v. A. G. S. R. R. Co.*, 553.
25. § 2876. Petition for rehearing. *Ex parte Farquhar & Son*, 375.
26. § 2892. Lien on personal property not subject to levy and sale under execution. *Kennedy v. Smith*, 83.
27. § 2986. Notice to non-resident defendant. *Meyer v. Keith*, 519.
28. § 3048. Jurisdiction of equity to enforce mechanic's lien. *Colby v. St. James (Colored) M. E. Church*, 259; *B'gham. Building & Loan Asso. v. May & Thomas Hardware Co.*, 276.
29. § 3296. Damages for cutting timber. *Alabama State Land Co. v. Reed*, 20; *Rogers v. Brooks*, 32.
30. § 3747. Assault with knife. *Wilson v. State*, 194.
31. § 3773. Defamation. *Beal v. State*, 234.
32. § 3775. Carrying concealed weapons. *Sewell v. State*, 163.
33. § 3789. Larceny. *Bailey v. State*, 143; *Wait v. State*, 164.
34. § 4033. Disturbing religious worship. *Salter v. State*, 207.
35. § 4038. Selling or giving liquor to minor. *Heath v. State*, 179.
36. § 4057. Indictment for gaming. *Thompson v. State*, 173.
37. § 4239. Trial before justice of the peace. *Ex parte Pruitt*, 225.
38. § 4259. Warrant of arrest. *Wilson v. State*, 194.
39. § 4292-94. Recognizance of witness. *State v. Calhoun*, 279.
40. § 4335. Discharge of juror. *Pierson v. State*, 148.
41. § 4397. Warrant of arrest. *Wilson v. State*, 194.
42. § 4420. Form of bail. *State v. Kyle*, 256.
43. § 4427. Effect of undertaking of bail. *State v. Calhoun*, 279.
44. § 4431. Undertaking of bail. *Holcombe v. State*, 185; *State v. Kyle*, 256.
45. § 4445. Objection to indictment. *Germolgez v. State*, 216.
46. § 4473. Defendant testifying for himself. *Hicks v. State*, 169.
47. § 4842. Prosecution for bastardy. *State v. Woodson*, 201.
48. § 4848. Limitation of prosecution for bastardy. *State v. Woodson*, 201.

COLLATERAL SECURITY.

1. *Transfer of stock as collateral security; notice thereof.*—The power to negotiate loans being expressly conferred by charter upon a Trust & Savings Company, if the cashier of such company, in ne-

COLLATERAL SECURITY—CONTINUED.

gotiating a loan for a customer, and in the course of the collection of the proceeds of such loan, acquires knowledge and receives notice of the pledge of shares of the capital stock of such company as collateral security, such knowledge and notice is imputed to the company. *B'gham. Trust & Sav. Co. v. La. Nat. Bank*, 379.

2. *Same*.—The knowledge thus imputed to the company is binding upon and controls it in subsequent transactions with such borrower, though conducted by different officers after the former cashier's death, so long as the shares of stock remain in the hands of the transferee. *Ib.* 379.

COMMERCIAL FERTILIZERS.

1. *Note given on sale of commercial fertilizer; failure to comply with statute*.—In an action on a promissory note given for the price of a quantity of commercial fertilizer bought by defendant, a plea averring that the sale was made in Alabama, and that the tags were not affixed to the bags when delivered, and that the sellers had not taken out a license, as required by law, (Code, §§ 140-141), is a full defense to the action. *Merriman & Co. v. Knox*, 93.
2. *Same; not affected by the non-residence of seller*.—Before a valid sale of commercial fertilizer can be made in this State, the seller must be licensed, and the fertilizer tagged, as required by the statute (Code, §§ 139-141); and this is true whether the seller is a resident or non-resident, and whether the fertilizer was manufactured in this State or elsewhere. *Ib.* 93.

COMMON CARRIER

1. *Action against foreign railroad company; when properly brought in this State*.—A contract of affreightment with a foreign railroad company, operating a line of its railway in Alabama, by a resident of this State, for the transportation of freight from his place of residence to another State, is an Alabama contract, and an action for its breach can be brought here. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
2. *Action for breach of contract of affreightment; burden of proof*.—If, in an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, it is shown that the defendant failed to deliver such stock in a safe condition, within a reasonable time, a presumption of negligence arises, and the onus is upon the defendant to excuse itself from negligence. *Ib.* 389.
3. *Same; measure of damages*.—In an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, the measure of damages is the difference in the market value of said stock at the place of consignment, if they had been delivered without any delay, and their market value after their delivery at such place, in the condition they were shown to be by the evidence. *Ib.* 389.
4. *Charge to the jury; does not assume negligence*.—An instruction to the jury that, if a carrier, having undertaken to deliver live stock, failed to deliver it in a safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof is shifted to the defendant to excuse itself from negligence, is not erroneous, as assuming that the stock was shipped in a safe condition, and injured during transportation. *Ib.* 389.

COMMON CARRIER—CONTINUED.

5. *Same*.—In an action against a common carrier for injury to live stock, alleged to have been caused by unreasonable delay in transporting the same, an instruction that, if the jury believe from the evidence the plaintiff is entitled to recover, the measure of damage is the difference in the market value of the stock, if they had been delivered without delay, and their market value after their delivery, in the condition the evidence shows they were in, is not erroneous as assuming that the stock was injured in transportation. *Ib.* 389.
6. *Common carrier; liability for all damage referrible to negligent delay in transportation*.—A common carrier, guilty of negligent delay in the transportation of live stock, is liable for all damages resulting from the effect of such delay upon the physical condition of the stock, or from their viciousness aroused by the unnecessary confinement incident thereto. *Ib.* 389.
7. *Charge to the jury; nominal damages*.—In an action for damages caused by negligent delay in transporting freight, a charge to the jury that seeks to limit the plaintiff's recovery to nominal damages, on the theory that by ordinary prudence the injury complained of could have been repaired, is affirmatively bad, if, for aught that is hypothesized in said charge, the plaintiff might have been put to great trouble and expense in repairing the injury to his property caused by defendant's negligence. *Ib.* 389.
8. *Same; not disregarding testimony*.—In an action for injury to live stock, caused by delay in transporting the same, an instruction "that the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of the same to the railroad company, is ten or twelve hours," is not open to the objection that it disregards the testimony adduced in the case, that "usually stock in shipping go through very nicely in ten, fifteen or twenty hours;" the tendency of this evidence being merely to show that the stock would not be injured on a journey lasting from ten to twenty hours. *Ib.* 389.
9. *Bill of lading; right of bona fide purchaser*.—A bona fide purchaser of a false bill of lading from the person to whom it was issued by a railroad company's agent, may hold the company liable to the extent of advances made by him on such bill of lading, under section 1179 of the Code of 1886. *Jasper Trust Co. v. K. C., M. & B. R. Co.*, 418.
10. *Same; estoppel of carrier*.—As between a railroad company issuing a bill of lading, regular on its face, and one who shows himself to be the bona fide transferee or purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in such receipt. *Ib.* 418.
11. *False issue of bill of lading by agent of railroad company; inquiry necessary by endorsee*.—When a railroad company's agent issues a bill of lading to a fictitious firm, for goods never received, and endorses it in the name of said firm, the endorsee is put upon inquiry concerning the endorsing firm; and failing to inform himself as to whether there was such a firm, and not obtaining the endorsement from the firm to whom the bill of lading was issued, he can not recover damages from the railroad company under section 1179 of the Code of 1886. *Ib.* 418.
12. *Common carrier; custom of receiving and discharging passengers at a place other than a regular station*.—If a common carrier is in the habit, or has the custom, of receiving and discharging passengers at a place other than a regular station on its road, a passenger, who, knowing of such custom, attempts to board a

COMMON CARRIER—CONTINUED.

train at such place, is as much justified in the assumption that the carrier's cars are in a safe condition, as he would be were he attempting to board them at a regular station. *North B'gham Railway Co. v. Liddicoat*, 545.

CONSPIRACY. See **CRIMINAL LAW**, 15.

CONSTITUTIONAL LAW.

1. *Local prohibitory law; constitutional provisions affecting title and subject-matter.*—A local prohibitory law being entitled "An act to prohibit the sale, giving away or disposing of any spirituous, vinous or malt liquors, or intoxicating bitters, beverages or drinks, or fruits preserved in alcohol or alcoholic liquors," within the specified territory; a provision for refunding the amount paid on licenses for the current year, and appropriating money out of the public treasury for that purpose, is outside of the subject-matter expressed in the title, and is, therefore, unconstitutional and void; but a conviction may, nevertheless, be had under the punitive provisions of the statute, which are separate and distinct from the unconstitutional provision. *Bradley v. State*, 177.
2. *License tax on foreign corporations, under statutory and constitutional provisions.*—The statute approved February 18th, 1893, entitled "An act to require all corporations to pay a fee or license for the use of the State before commencing business in the State," (Sess. Acts 1892-3, p. 690), does not apply to or include a foreign insurance company, which was lawfully engaged in doing business here on that day, having fully complied with all the constitutional and statutory provisions then in force regulating the right of foreign corporations to do business in this State. To make the statute apply to such corporations, would extend its provisions beyond the scope and purview of its title. *State v. Hartford Fire Ins. Co.*, 221.
3. *Notice before filing claim of lien; constitutional provisions as to laws impairing remedy for enforcement of contracts.*—The provision contained in the act approved February 12, 1891, requiring ten days notice to be given by a person claiming a mechanic's or material-man's lien before filing his claim of lien (Sess. Acts 1890-91, p. 578, § 5), applies to liens claimed under contract made prior to the passage of the statute, the work not having been commenced in this case until after its passage; and this application of the statute does not make it offend the constitutional provision prohibiting laws impairing the obligation of contracts or the remedy for their enforcement. *Osborn v. Johnson Wall Paper Co.*, 309.

CONTEST OF ELECTIONS.

1. *Contest of election before probate judge; security for costs.*—The contest of an election to a county office before the probate judge (Code, §§416-27), though triable by the judge and not by the court, is properly regarded as a case pending in the court, and bond or security for costs, or any other paper filed in the case, is properly entitled in its caption as of a case pending in the Probate Court. *Morrow v. Russell*, 271.

CONTRACTS.

1. *Implied contract for work and labor done.*—When one performs certain work for another with the latter's knowledge and assent, and it is accepted, it is not necessary that there should have been an express contract to bind the latter, as the law

CONTRACTS—CONTINUED.

- construes the acceptance of the work to be an implied contract therefor. *Joseph, Gaboury & Co. v. Southwark Foundry & Machine Co.*, 47.
2. *Partial payments, with interest.*—When a contract of purchase provides that the purchaser shall pay "fifteen dollars cash, and balance with interest from date in quarterly instalments of 10 dollars each," the quarterly payments so required are ten dollars net, including interest accrued at date of payment, to be continued until the entire purchase money, with interest, is paid. *Root v. Johnson*, 90.
 3. *Forfeitures of contract; specific performance.*—Forfeitures not being favored in equity, relief by specific performance will be granted when the court can give by way of compensation all that could be justly demanded, unless the penalty is fairly proportionate to the damage suffered by the breach. *Ib.* 90.
 4. *Limitation of contract of pledge.*—The clause in a contract of pledge, "which cotton has been advanced upon by us to its full value," limits the operation of the pledge to the factor's actual interest in the cotton, and the transaction is not taken out of the common-law rule, which protects the owner against an unauthorized pledge by one who holds property as a factor, or agent to sell. *Com. Bank v. Hurt*, 130.
 5. *Damages for breach of contract to lend or advance money.*—Under a written contract by which defendants agreed to sell and convey to plaintiff a vacant lot, and to advance to her \$300 to build a house on it; \$150, about one-fourth part of the agreed purchase-money, being payable in advance, and the residue in monthly instalments of \$8.50, which was also agreed on as the "monthly rental value of the premises," although the vacant lot had no rental value whatever; defendants having become insolvent, and made an assignment for the benefit of their creditors, after receiving the cash payment and several monthly instalments; held, that plaintiff could recover only nominal damages for their failure to advance the \$300 to build a house, and could not be allowed to prove, as affecting the question of damages, that the value of the vacant lot was much less than the agreed price. *Gooden v. Moses Bros.*, 230.
 6. *Joinder of counts for work and labor done under a contract, and for damages for breach of contract.*—When a party, under a contract, has, in part, performed his contract, and is wrongfully discharged or forced to abandon the work, he may sue upon the contract to recover the price agreed to be paid, for the work already performed, and may in the same suit declare for damages sustained by the breach of the other party in forcing him to abandon the work before its completion; the damages thus declared for being the natural consequences of the breach complained of. *Dunforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.
 7. *Breach of contract; measure of damages.*—In an action for the breach of a contract not to engage in a certain business, the fact that in the purchase price paid by plaintiff there was included the value of an unexpired license to conduct such business issued to the defendant, constitutes no element of damage, and can exert no influence upon the question of the extent and amount of damage suffered by plaintiff by reason of the breach complained of. *Howard v. Taylor*, 450.
 8. *Same.*—In an action to recover for the alleged breach of a contract, entered into by defendant on selling his business to plaintiff, in which he agreed not to carry on a similar business in

CONTRACTS—CONTINUED.

the same town, evidence that plaintiff's business had fallen off greatly after defendant opened up at another place in the same town, and and that defendant's old customers returned to him, furnished no data by which the jury could possibly arrive at the amount of plaintiff's damages; and on such evidence he can only be entitled to nominal damages. *Ib.* 450.

9. *Contract to await result of contest.*—Where an attorney agrees or contracts to hold a certain sum of money collected for his client "to await the result of a contest as to the validity of a claim for that sum," to be instituted by a third person, an action for money had and received brought by said third person against the attorney is such a contest as was contemplated by the contract, since the client could have supervened as a claimant. *Myers v. Byars*, 484.
10. *Misrepresentation; executed contract can be rescinded therefor.*—A misrepresentation by one of the parties to a contract of sale, in regard to a material fact which operated as an inducement to the other party, upon which he had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, although wholly executed, if the attempt is seasonably made. *Baker v. Maxwell*, 558.
11. *Averments of bill to rescind contract.*—A bill to rescind a contract, whereby the complainants conveyed to defendant certain lands, in consideration of the transfer to them of certain mortgages, on the ground of misrepresentation by defendant as to the title of the mortgagors to the realty, and the existence of the personality at the time of the mortgage, need not negative the solvency of the mortgagors, nor aver that the debts secured by the mortgages were not enforceable otherwise than by the foreclosure of the mortgages. *Ib.* 558.
12. *Same.*—A bill filed to rescind a contract for fraudulent misrepresentations which alleges that said misrepresentations were as to material facts, and were conducive to the transaction, is not demurrable on the ground that the representations were not such as the complainants had a right to rely upon, since they might, by the exercise of diligence, have ascertained their falsity. *Ib.* 558.
13. *Same; transfer to third party.*—If, in a bill to rescind a contract, whereby complainants conveyed to defendant certain land in consideration of the transfer to them of certain mortgages held by the defendant, on the ground of fraudulent misrepresentations as to the property conveyed in said mortgages, it is shown that the complainants assigned such mortgages for value and without recourse to a third person, and afterwards accepted a re-assignment without recourse on such third person, the complainants are not entitled to the relief prayed for, unless the bill further avers such facts as imposed a legal or equitable obligation on the complainants to accept such re-assignment. *Ib.* 558.
14. *Same; complainants' knowledge of the falsity of the representations.* If it is not alleged in, or inferrible from, the averments of the bill, that the complainants knew the falsity of the representations at the time of the transfer by them to such third person, they are entitled to the rescission of the contract, notwithstanding by such assignment of the mortgages, the alleged fraud was condoned, the transaction infected by it ratified, and the complainants may have been guilty of laches in the institution of their suit. *Ib.* 558.

CONTRACTS—CONTINUED.

15. *Contract modified by subsequent contract; waiver.*—When, after the execution of a contract, by which a builder is to complete a house "ready for occupancy," within 60 days from the date of said contract, according to plans which do not require the finishing of the second story and the putting on of the last coat of paint, the owner, after the expiration of the 60 days, makes another contract with said builder to do the additional work for extra compensation, he will be held to have waived the original stipulation to complete the work within the specified time, and to have substituted a stipulation for the completion of the work within a reasonable time. *Cornish v. Suydam*, 620.

CORPORATIONS.

CORPORATIONS IN GENERAL.

1. *Definition of the capital stock of a corporation.*—The capital stock of a corporation is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and is a trust fund for the benefit and security of the creditors of the corporation. *Com. Fire Ins. Co. v. Bd. of Revenue*, 1.
2. *Capital stock of one corporation can not be invested in the capital stock of another corporation.*—A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for the capital stock of a new corporation; nor can it do this indirectly through persons acting as its agents. *Ib.* 1.
3. *Insurance company not authorized to subscribe to the capital stock of another corporation.*—Section 1535, subdivision 7 of the Code, which provides that insurance companies may "invest their money in real or personal property, stocks or choses in action," does not authorize insurance companies to subscribe for and invest its capital stock in the capital stock of other corporations. *Ib.* 1.
4. *Taxation; insurance company not relieved as to its capital stock invested in other corporations.*—An insurance company, which has invested a portion of its capital stock in the capital stock of another corporation, can not be relieved from the payment of taxes assessed against such part of its capital stock, on the ground that such portion is "invested in property which is otherwise taxable," as provided by section 453, subdivision 9, of the Code. *Ib.* 1.
5. *The capital stock of a corporation a trust fund in the hands of directors.*—The governing body or directors of a corporation hold the capital stock therein as a trust fund, in order that it may be preserved and administered primarily, for the benefit of creditors, and secondarily, for the benefit of the stockholders. *Corey v. Wadsworth*, 68.
6. *Insolvent corporation; officer or director can not be a preferred creditor.*—A member of the governing body of an insolvent corporation, of which corporation he is a non-secured creditor, can not be made a preferred creditor in the administration or disposition of the corporate assets; but the assets must be distributed *pro rata* among all the non-secured creditors. If, however, valid liens have been created in favor of such officer or member, supervening insolvency can not destroy or impair them. *Ib.* 68.
7. *Same.*—The directors or officers of an insolvent corporation are

CORPORATIONS—CONTINUED.

trustees for the creditors, and must manage its property and assets with strict regard to the interests of its creditors; and if they are themselves creditors, while the insolvent corporation is under their management, they can not secure to themselves any preferment or advantage over other creditors. *Ib.* 68.

8. *When corporation is insolvent.*—A corporation is insolvent when its assets are insufficient for the payments of its debts and it has ceased to do business, or has taken or is about to take a step, which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassment is such that early suspension and failure must ensue *Ib.* 68.
9. *Dealings with agent; secret instructions and limitations.*—One who deals with an agent or officer of a corporation within the scope of the apparent powers of such agent or officer, is not affected by secret instructions of the corporation to him, or secret limitations, which may have been placed upon the power of such agent. *B'gham. Tr. & Sav. Co. v. La. Nat. Bank*, 379.
10. *Transfer of stock as collateral security; notice thereof.*—The power to negotiate loans being expressly conferred by charter upon a Trust & Savings Company, if the cashier of such company, in negotiating a loan for a customer, and in the course of the collection of the proceeds of such loan, acquires knowledge and receives notice of the pledge of shares of the capital stock of such company as collateral security, such knowledge and notice is imputed to the company. *Ib.* 379.
11. *Same.*—The knowledge thus imputed to the company is binding upon and controls it in subsequent transactions with such borrower, though conducted by different officers after the former cashier's death, so long as the shares of stock remain in the hands of the transferee. *Ib.* 379.
12. *Lien of a corporation on the shares of the corporation; subordinate to prior pledge.*—When a cashier of a Trust & Savings Company, in the negotiation of a loan, and the collection of the proceeds thereof, acquires knowledge and notice of the pledge of shares of its capital stock by a stockholder, such knowledge or notice is imputable to said company, and it can not under section 1674 of the Code, assert a lien on the shares of stock so pledged for the security of a debt to it, subsequently contracted by said stockholder. *Ib.* 379.
13. *Action against a corporation; judgment by default; proof of service of process.*—To authorize the rendition of a judgment by default against a corporation, the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service such an officer or agent of the defendant, as was, by law, authorized to receive service of process for, and on behalf of the defendant. *Oranna Building Asso. v. Agee*, 571.
14. *Plea of the general issue; admissions thereunder by a corporation formed by consolidation.*—In an action for personal injuries against a corporation, on the theory that it assumed the liability of a negligent corporation, which consolidated with others to form the defendant, after the injuries were received, and before the institution of the suit, the plea of the general issue admits the defendant's corporate character, but does not admit that the defendant derived its existence from the consolidation of the negligent company with other corporations. *Zealy v. B'gham Railway & Electric Co.*, 579.

CORPORATIONS—CONTINUED.

15. *Action against a corporation; evidence of consolidation.*—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property, &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to prove that the negligent corporation had been merged into the defendant. *Ib.* 579.

FOREIGN CORPORATIONS.

16. *By whom action may be instituted, and in what court.*—The statute imposing a penalty on foreign corporations doing business in this State, without a compliance with constitutional and statutory provisions regulating their right to do business here (Sess. Acts 1888-7, p. 102), provides that an action to recover the penalty shall be brought in the name of the State, "by the solicitor of the circuit in which the offense is committed," but does not specify the court in which it shall be brought; and the City Court of Gadsden, having all the powers and jurisdiction of a Circuit Court, while its solicitor is "charged with the performance in said court of all the duties imposed by law upon circuit solicitors;" *held*, that an action to recover such penalty may be brought in said court and by its solicitor. *Tenn. Mut. B'ldg & L. Asso. v. State*, 197.
17. *Judgment by default against corporation, without writ of inquiry.* In action against a corporation to recover a statutory penalty, judgment by default may be rendered on proof of service on a person named as agent; and the penalty being necessarily the amount of the recovery, no writ of inquiry is necessary to assess the damages. *Ib.* 197.
18. *License tax on foreign corporations, under statutory and constitutional provisions.*—The statute, approved February 18th, 1893, entitled "An act to require all corporations to pay a fee or license for the use of the State before commencing business in the State" (Sess. Acts 1892-3, p. 690), does not apply to or include a foreign insurance company, which was lawfully engaged in doing business here on that day, having fully complied with all the constitutional and statutory provisions then in force regulating the right of foreign corporations to do business in this State. To make the statute apply to such corporations, would extend its provisions beyond the scope and purview of its title. *State v. Hartford Fire Ins. Co.*, 221.
19. *Foreign corporations; requisite authority of agents.*—The agent, which foreign corporations are required by the constitution to have at a known place of business in this State, need not be invested with any of the contractual powers which the corporation is permitted to exercise by its constating instruments, but it is sufficient if he has authority to accept and receive service of process. *McCull v. Am. Freehold Land Mortg. Co.*, 427.

CORPORATIONS—CONTINUED.

20. *Same ; prosecution of suits not the doing of business.*—The institution and prosecution of suits in the courts of this State by a foreign corporation, is not the doing of business here, within the meaning of the constitutional and statutory provisions. *Ib.* 427.
21. *Action against foreign railroad company ; when properly brought in this State.*—A contract of affreightment with a foreign railroad company, operating a line of its railway in Alabama, by a resident of this State, for the transportation of freight from his place of residence to another State, is an Alabama contract, and an action for its breach can be brought here. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.

MUNICIPAL CORPORATIONS.

22. *Municipal corporation ; sufficient allegation of its existence.*—A complaint by a town, alleging that the defendant sold liquors within the corporate limits of said town, sufficiently avers that the plaintiff is a municipal corporation. *Smith v. Town of Warrior*, 481.
23. *Municipal corporation, incorporated under the general statute ; right to prohibit the sale of liquors at retail.*—A municipal corporation, incorporated under the general statute, has the power to prohibit the sale of liquor within its corporate limits by ordinance properly enacted. *Ib.* 481.

COURTS.

PROBATE COURT.

1. *Sale under decree of Probate Court ; estoppel.*—When lands are sold under a decree of the Probate Court, and the purchase money is received by the administrator, and accounted for in his administration, the sale, in a court of equity, will be treated as valid, and the parties estopped from impeaching it. *Oden v. Dupuy*, 86.
2. *Testamentary trusts ; jurisdiction of Probate Court.*—A Probate Court has no jurisdiction to enforce and settle a trust created by will ; but if the trust is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person, as executor and as trustee, are not so blended that they cannot be distinguished or separated from each other, the Probate Court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as the trustee under the will. *Creamer v. Holbrook*, 51.
3. *Same.*—When one person is appointed executor, and is also made the trustee under the will with powers unconnected with his ordinary duties as executor, the Probate Court can exercise the same control over him as an executor merely, as it could if he alone had been made the executor, and the special trust had been conferred upon some other person. *Ib.* 51.
4. *Contest of election before probate judge ; security for costs.*—The contest of an election to a county office before the probate judge (Code, §§ 416-27), though triable by the judge and not by the court, is properly regarded as a case pending in the court, and bond or security for costs, or any other paper filed in the case, is properly entitled in its caption as of a case pending in the Probate Court. *Morrow v. Russell*, 271.
5. *Petition for sale of land to pay decedent's debts ; sufficient averments.*—A petition by an administrator for an order to sell lands be-

COURTS—CONTINUED.

longing to the estate of his intestate, for the payment of his debts (Code, §§ 2104, 2106), which alleges that "there is no personal property belonging to said estate with which to pay the debts of said decedent, and that it is necessary to sell the said lands to pay the debts of said estate," is sufficient to confer jurisdiction on the Probate Court to decree a sale. *Smith v. Brannon*, 445.

CIRCUIT COURT.

6. *A judge cannot dismiss petition for a re-hearing.*—The jurisdiction to finally hear and determine a petition for re-hearing, being conferred by statute (Code, § 2876) upon the Circuit Court, and not upon the judge, the judge has no authority to dismiss such a petition. *Ex parte Farquhar*, 375.
7. *When judgment not set aside for want of notice.*—A judgment in a condemnation proceeding in the Circuit Court, on appeal from the Probate Court, will not be set aside for an alleged want of notice to the respondent of the appeal from the Probate Court, when the record shows the respondent appeared in the Circuit Court by her attorney, and defended against the judgment of the condemnation.—*Newton v. Ala. Midl. Rwy. Co.*, 468.
8. *Appearance shown by the record conclusive.*—When it is shown by the record that on an appeal to the Circuit Court the defendant appeared by her attorney and defended, such appearance cannot be disputed on motion to set aside the judgment for want of notice of appeal; the record entry in such case being conclusive. *Ib.* 468.
9. *Amendment of petition.*—On appeal to the Circuit Court from a judgment in the Probate Court in a condemnation proceeding, the petition can be amended so as to include more land than was included in the original petition; and both parties being before the court when such amendment was allowed, the judgment in such cause by the appellate court will not be set aside on account of such amendment.—*Ib.* 468.
10. *Motion docket; no part of a record.*—A motion docket is no part of a record proper of the Circuit Court, and proceedings shown by it can only become so by being enrolled as matter of record, or by bill of exceptions. *Lienkauff & Strauss v. Tuscaloosa Sale & Advancing Co.*, 619.

CITY COURT.

11. *By whom action may be instituted and in what court.*—The statute imposing a penalty on foreign corporations doing business in this State, without a compliance with constitutional and statutory provisions regulating their right to do business here (Sess. Acts 1886-7, p. 102), provides that an action to recover the penalty shall be brought in the name of the State, "by the solicitor of the circuit in which the offense is committed," but does not specify the court in which it shall be brought; and the City Court of Gadsden having all the powers and jurisdiction of a Circuit Court, while its solicitor is "charged with the performance in said court of all the duties imposed by law upon circuit solicitors;" *held*, that an action to recover such penalty may be brought in said court and by its solicitor. *Tenn. Mut. Building & Loan Asso. v. State*, 97.
12. *Signing bill of exceptions.*—A statute creating a City Court, that provides that ten days after the rendition of a final judgment in said court, such judgment shall be "as completely beyond the control of the court, as if the term of the court at which

COURTS—CONTINUED.

said judgment was rendered, had ended at the end of said ten days," does not limit the signing of the bill of exceptions to the ten days, next after judgment rendered in the City Court. The signing of the bill of exceptions is not a taking of control of the judgment by the court.—(*Stein v. McArdle*, 25 Ala. 581, overruled.) *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.

13. *Appeal from Recorder's Court; motion to quash proceedings.*—When a person, who has been arrested, without affidavit or warrant, for the violation of a city ordinance, appears before the Recorder, and without objection pleads not guilty, and is tried and fined, he is presumed to have waived the want of an affidavit or warrant of arrest; and on appeal to the City Court a motion to quash the proceedings in that court, on the ground that the prosecution was commenced without affidavit or warrant, comes too late, and is properly overruled. *Aderhold v. Mayor and City Council of Anniston*, 521.
14. *Variance between complaint and summons.*—When, in a prosecution for the violation of a city ordinance, the summons to the defendant commanded him to appear before the Recorder and answer the charge of "disorderly conduct and fighting," and the complaint filed in the City Court, on appeal, averred that the defendant "participated in a fight," the variance is immaterial, and a demurrer to the complaint on the ground of such variance is properly overruled. *Ib.* 521.
15. *Filing of complaint.*—A complaint may be filed in the City Court on appeal any time before the trial. *Ib.* 521.

CRIMINAL LAW.

ADULTERY.

1. *Charge ignoring evidence of lewd character.*—A man being on trial under an indictment for living in adultery with a woman, and evidence of her lewd character having been admitted without objection, a charge instructing the jury that "the fact that she has a bad character for virtue does not aid the prosecution, unless it has otherwise proved his guilt as charged in the indictment," is properly refused. *Cox v. State*, 162.
2. *Charge on part of evidence.*—A charge, which specifying one of several criminating circumstances in evidence, instructs the jury that it is not enough to justify a conviction, is properly refused, since it tends to mislead, and is to some extent argumentative. *Ib.* 162.

ASSAULT AND BATTERY.

3. *Assault with knife.*—A conviction may be had for an assault with a knife (Code, § 3747), on proof that the defendant, during an altercation with the prosecutor, advanced on him with a drawn knife, but was stopped by a bystander, and did not get nearer to him than "five or six feet," nor attempt to cut him. *Wilson v. State*, 194.

BAIL.

4. *Description of case in judgment nisi and sci. fa.*—In proceedings against bail on a forfeited recognizance, great particularity is not required, and technical objections for want of form are not available, if the particular case is made to appear to the court (Code, § 4431); and where the name of the case is correctly stated in the judgment *nisi* and the *scire facias*, followed by the words "*Indictment for burglary*," it is not necessary that they

CRIMINAL LAW—CONTINUED.

- should recite, as a fact, that an indictment for burglary has been found. *Holcombe v. State*, 185.
5. *Correspondence of commitment and indictment in description of offense.* When the defendant was bound over to answer an indictment for "burglary and grand larceny," and an indictment is found against him for either or both of those offenses, his bail are equally bound for his appearance. *Ib.* 185.
 6. *Order for bail after transfer of defendant for safe-keeping to another county.*—When the custody of the defendant, after commitment but before indictment found, is transferred to another county for safe-keeping, and he there makes application for bail, the order admitting him to bail is properly indorsed on the copy-warrant annexed to the sheriff's return, and if it requires the bail-bond to be "payable and conditioned as required by law," it sufficiently shows that he is required to appear at the proper court of the county in which he was committed, although it does not specify the name of the particular court or county. *Ib.* 185.
 7. *Same.*—In such case, the order admitting to bail is properly addressed and given to the sheriff who has the defendant in his custody, and bail is to be taken by him, although it binds the defendant to appear and answer an indictment in the county in which he was committed. *Ib.* 185.
 8. *Recognizance of witness taken by justice of the peace; amount and surety.*—On the preliminary investigation of a criminal charge, a justice of the peace has authority to require a witness for the prosecution to enter into a recognizance in a greater sum than \$100 for his appearance in court to testify; but he can not require the witness to give surety for his appearance, when he is a non-resident, or resides more than fifty miles from the place at which the examination is had (Code, §§ 4292-94); yet, the obligation being joint and several (§4427), the principal is bound by it, though no recovery could be had against the surety. *State v. Calhoun*, 279.
 9. *What discharges bail; failure to find indictment.*—When a recognizance is conditioned for the appearance of the principal at the next term of the Circuit Court, "and from term to term thereafter until discharged by law" (Code, §§ 4420, 4431), and he fails to appear at the next term of the court, the bail are not discharged by the failure to find an indictment against him at that term when it appears that the case was regularly entered on the docket and continued, and that no order discharging them was asked or granted. *State v. Kyle*, 256.

BURGLARY.

10. *Unnecessary averments in indictment.*—In an indictment for the burglary of a dwelling-house, an averment that "goods, or clothing, things of value," were kept therein for use, sale, or deposit, is unnecessary, but, being matter of description, must be proved; and the averment is not supported by proof of the fact that a bed and a bureau were kept in the house for use, no proof of their value being adduced, or that they were of any use. *Gilmore v. State*, 154.
11. *Relevancy of evidence as tending to show motive.*—Under an indictment charging the burglary of a dwelling house with intent to steal, the prosecution may prove, as tending to show a motive for the offense, a conversation had between the owner of the house and the defendant, about a month before the burglary, which tends to show that the defendant knew or believed that money was kept in the house. *Ib.* 154.

CRIMINAL LAW—CONTINUED.

12. *Outhouse within curtilage of dwelling-house*.—A conviction may be had for burglary (Code, § 3786) in breaking and entering, with intent to steal, a smoke-house in which meat, corn, &c. is kept for family use, and in which meat is sometimes smoked, although it is distant from the dwelling-house about forty yards, and is not inclosed by the same fence. On these facts, if the court can not, as matter of law, hold that the building is within the curtilage of the dwelling-house, the jury may so find as matter of fact. *Wait v. State*, 164.
13. *Possession of stolen goods; abstract charge*.—A charge instructing the jury that "the mere possession of stolen goods, without other evidence of guilt, is not *prima facie* evidence of burglary," is properly refused because abstract, when there is other evidence tending to show the defendant's guilt as charged. *Hicks v. State*, 169.

CARRYING CONCEALED WEAPONS.

14. *Weapons found on search of person under arrest*.—Whether a conviction may be had for carrying concealed weapons (Code, § 3775), on evidence showing that a pistol was found concealed on the defendant's person by a person who assisted in searching him while in custody under an illegal arrest, is not decided, because it does not appear that the arrest was in fact illegal, and a part of the evidence objected to was legal. *Sewell v. State*, 183.

CONSPIRACY.

15. *Conspiracy; liability of each for acts of others*.—When two or more persons combine or conspire to do an unlawful act, or to commit a criminal offense, each is equally responsible for the act of the others in furtherance of their common purpose, if he is present at the time, aiding, encouraging, or ready to assist if necessary, and if the act done is within the scope of their common purpose, or is the natural and proximate consequence of the act intended; but they are not responsible for an act prompted by the individual malice of the perpetrator, and it is a question for the jury whether the act done was within the scope of the common purpose, or grew out of the individual malice of the perpetrator. *Pierson v. State*, 148.

DEFAMATION.

16. *Defamation; constituents of offense*.—To authorize a conviction for defamation (Code, § 3773), the accusation must have been falsely and maliciously made; but the jury may infer malice from the character of the accusation and the want of probable or reasonable grounds for making it. *Beal v. State*, 234.

DISTURBING RELIGIOUS WORSHIP.

17. *Constituents of offense*.—A conviction may be had for disturbing an assemblage of persons met for religious worship (Code, § 4033), on proof that the defendant did any willful act, within the terms of the statute, the natural consequence of which was to disturb the assemblage, and which did in fact disturb them, although he did not have the purpose and specific intent to disturb them. (*Harrison v. State*, 27 Ala. 154, declared limited and explained by later decisions.) *Salter v. State*, 207.

CRIMINAL LAW—CONTINUED.

EVIDENCE.

18. *Evidence relevant to question of self-defense.*—The defendant being on trial for the murder of his wife, whom he shot with a pistol and killed on her refusal to go home with him, and having proved that she was a woman of dangerous character, and testified for himself that he wanted to take her home because she had been drinking, and that, as he approached her, she cursed him, threw her hand towards her bosom, and stepped towards him; he may further testify that she owned a pistol, and was in the habit of carrying it in her bosom, although the evidence for the prosecution showed that no weapon was found on her body, that she was standing still when shot, holding her hands down in front of her person, and that he had threatened, while trying to borrow a pistol, that he would kill her if she did not go home with him. *Wiley v. State*, 148.
19. *Relevancy of evidence as tending to show motive.*—Under an indictment charging the burglary of a dwelling-house with intent to steal, the prosecution may prove, as tending to show a motive for the offense, a conversation had between the owner of the house and the defendant, about a month before the burglary, which tends to show that the defendant knew or believed that money was kept in the house. *Gilmore v. State*, 154.
20. *Tracks or foot-prints as evidence; to what witness may testify.*—The evidence showing that, on the morning after the burglary, naked foot-prints were found on the ground pointing to and from the house occupied by the defendant, and he voluntarily making tracks near them, a witness may testify that he measured the two sets of tracks, and that they were the same. *Ib.* 154.
21. *Confessions of third person as evidence.*—In a criminal case, the confessions of a third person, to the effect that he committed the offense, are not admissible as evidence for the defendant. *Ib.* 154.
22. *Defendant testifying for himself; cross-examining and impeaching.*—When the defendant in a criminal case elects to testify in his own behalf (Code, § 4473), he is subject to cross-examination like any other witness, and may be impeached by proof of contradictory statements previously made by him; and this principle extends to declarations or statements which have been excluded as evidence when offered as confessions, because not shown to have been made voluntarily. *Hicks v. State*, 169.
23. *Possession of stolen goods; variance.*—The defendant being charged with the larceny of four ten-dollar gold coins, the prosecution may prove that, when arrested, the day after the larceny, he had in his possession a five-dollar coin, and that he handed to a companion a bag containing a ten-dollar coin and ten silver dollars, there being also evidence from which the jury might infer that this money was procured in exchange or barter for that stolen. *Ib.* 169.
24. *Proof of playing and betting by other persons.*—On a trial under an indictment for gaming, since the defendant could not bet with himself on the game, it is proper, if not necessary, for the prosecution to prove that other persons present played and bet on it. *Thompson v. State*, 173.
25. *Refreshing recollection of witness by memorandum.*—While it may not be permissible for the solicitor, during the examination of a witness, "to read from a memorandum of his testimony before

CRIMINAL LAW—CONTINUED.

- the grand jury," he may "ask questions from the memorandum to refresh the memory of the witness as to his testimony before the grand jury." *Ib.* 178.
26. *Proof of betting by defendant.*—Where one witness testifies that he saw the defendant and others playing and betting at a game of "craps," but does not state what was bet, and another, who was present at the time, testifies that the players "would all get down on their knees in a circle, put up the money, and throw the dice; that he saw defendant down on his knees, but does not recollect positively that he saw him put up any money, or shoot the dice, but his best recollection is that he did play," the jury may infer that the defendant bet money on the game. *Ib.* 173.
27. *Dying declarations as evidence.*—To authorize the admission of statements by the deceased as dying declarations, it is not enough to show that he died very soon afterwards, but it must appear that he was conscious of his condition, though no particular form of words is necessary; and where the declarations, as in this case, are merely expressive of great pain, requesting that a doctor be sent for, and saying that he could not stand it much longer unless relieved, they are not admissible. *Justice v. State*, 180.
28. *Weapons found on search of person under arrest.*—Whether a conviction may be had for carrying concealed weapons (Code, § 3775), on evidence showing that a pistol was found concealed on the defendant's person by a person who assisted in searching him while in custody under an illegal arrest, is not decided, because it does not appear that the arrest was in fact illegal and a part of the evidence objected to was legal. *Sewell v. State* 183.
29. *Conviction of larceny, as affecting competency or credibility of witness.*—Under statutory provisions (Code, § 2768), a conviction of larceny does not destroy the competency of a witness, but is admissible as evidence affecting his credibility. *Prior v. State*, 196.
30. *Testimony of witness not before grand jury.*—In a criminal case, a conviction may be had on the testimony of a witness who was not before the grand jury, and without producing the witness on whose testimony the indictment was found. *Germolgez v. State*, 216.

GAMING.

31. *Sufficiency of indictment.*—A form of indictment for betting at a game played with cards, dice, or some device or substitute for cards or dice, being now prescribed by statute (Code, § 4057; Form No. 16, p. 287), it is sufficient to follow that form, and it is not necessary to aver that the game was played. *Thompson v. State*, 173.
32. *Proof of playing and betting by other persons.*—Since the defendant could not bet with himself on the game, it is proper, if not necessary, for the prosecution to prove that other persons present played and bet on it. *Ib.* 173.
33. *Proof of betting by defendant.*—Where one witness testifies that he saw the defendant and others playing and betting at a game of "craps," but does not state what was bet, and another, who was present at the time, testifies that the players "would all get down on their knees in a circle, put up the money, and throw

CRIMINAL LAW—CONTINUED.

the dice; that he saw defendant down on his knees, but does not recollect positively that he saw him put up any money, or shoot the dice, but his best recollection is that he did play,"—the jury may infer that the defendant bet money on the game. *Ib.* 173.

34. *What is public house.*—A dwelling house may become a public house within the statutes against gaming, if several persons are in the habit of going to it frequently for the purpose of playing cards or "craps," although at one time the killing of a negro there "broke off the playing to some extent." *Ib.* 173.

HOMICIDE.

35. *Evidence relevant to question of self-defense.*—The defendant being on trial for the murder of his wife, whom he shot with a pistol and killed on her refusal to go home with him, and having proved that she was a woman of dangerous character, and testified for himself that he wanted to take her home because she had been drinking, and that, as he approached her, she cursed him, threw her hand towards her bosom, and stepped towards him; he may further testify that she owned a pistol, and was in the habit of carrying it in her bosom, although the evidence for the prosecution showed that no weapon was found on her body, that she was standing still when shot, holding her hands down in front of her person, and that he had threatened, while trying to borrow a pistol, that he would kill her if she did not go home with him. *Wiley v. State*, 146.
36. *Charge as to manslaughter.*—When a party is on trial for murder, it is the safer rule for the court to charge the jury as to all the degrees of homicide included in the indictment, "unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree;" but, when the evidence set out in the bill of exceptions shows that the defendant, if guilty at all, is guilty of murder, the failure of the court to charge as to the constituents of manslaughter is not error. *Pierson v. State*, 148.
37. *Homicide by husband; adultery of wife as provocation.*—If the husband detects his wife in the act of adultery, and immediately slays her or her paramour, the law does not entirely justify or excuse him, but holds the provocation sufficient, as matter of law, to reduce the killing to manslaughter; and if he detects them, not in the act of adultery, but in a compromising position under suspicious circumstances, and kills one or both of them, it is a question for the jury whether the provocation was sufficient to reduce the grade of the offense, and whether he acted under the heat of sudden passion thereby excited, as in other cases of homicide under the heat of passion excited by great provocation. *Hooks v. State*, 166.

INDICTMENT.

38. *Larceny from store-house; variance.*—Under an indictment in the form prescribed by law, charging larceny from a store-house (Code, § 3789; Form No. 51, p. 273), a conviction may be had on proof that the defendant stole the goods in the house, but was detected and arrested before he got out of the house with them. *Bailey v. State*, 143.
39. *Unnecessary averments in indictment.*—In an indictment for the burglary of a dwelling-house, an averment that "goods, or clothing, things of value," were kept therein for use, sale, or

CRIMINAL LAW—CONTINUED.

- deposit, is unnecessary, but, being matter of description, must be proved; and the averment is not supported by proof of the fact that a bed and a bureau were kept in the house for use, no proof of their value being adduced, or that they were of any use. *Gilmore v. State*, 154.
40. *Sufficiency of indictment*.—A form of indictment for betting at a game played with cards, dice, or some device or substitute for cards or dice, being now prescribed by statute (Code, § 4057; Form No. 16, p. 287), it is sufficient to follow that form, and it is not necessary to aver that the game was played. *Thompson v. State*, 173.
41. *Selling or giving liquor to minor; negating consent of parent or guardian*.—In an indictment for selling or giving liquor to a minor (Code, § 4038), it is not necessary to negative either the consent of the parent or guardian or the prescription of a physician; but, when the indictment contains these averments, it is the safer practice to prove them. *Heath v. State*, 179.
42. *Correspondence of commitment and indictment in description of offense*.—When the defendant was bound over to answer an indictment for "burglary and grand larceny," and an indictment is found against him for either or both of the offenses, his bail are equally bound for his appearance. *Holcombe v. State*, 185.
43. *Objections to indictment, going to formation of grand jury*.—When the record shows that the grand jurors were regularly drawn and summoned, a mistake of the clerk in transcribing one of their names as writing *Free* for *Firee*, is not good matter for a plea in abatement to an indictment (Code, § 4445); nor is it good matter for a plea in abatement, that the places of absent jurors were supplied by talesmen without an order discharging them. *Germolgez v. State*, 216.
44. *Same; indorsement of foreman's name, and names of witnesses*.—It is not good matter for a plea in abatement to an indictment, that in indorsing the name of the foreman of the grand jury only the initials of his christian name are given, instead of the full name; nor is it good matter for such plea, that after the indictment was filed in court the solicitor indorsed on it, without leave of the court, and without the consent of the defendant, the names of persons as witnesses before the grand jury. *Id.* 216.

JURORS AND JURIES.

45. *Discharge of juror on special venire*.—In a capital case, a special venire having been summoned, the court may excuse from service as a juror a person who is a policeman on active duty; this being, within the meaning of the statute (Code, § 4335), a "reasonable or proper cause to be determined by the court." *Pierson v. State*, 148.

LARCENY.

46. *Larceny from store-house; variance*.—Under an indictment in the form prescribed by law, charging larceny from a store-house (Code, § 3789; Form No. 15, p. 273), a conviction may be had on proof that the defendant stole the goods in the house, but was detected and arrested before he got out of the house with them. *Bailey v. State*, 143.
47. *Possession of stolen goods; variance*.—The defendant being charged with the larceny of four ten-dollar gold coins, the prosecution may prove that, when arrested, the day after the larceny, he had in his possession a five-dollar coin, and that he handed to a companion a bag containing a ten-dollar coin and ten

CRIMINAL LAW—CONTINUED.

silver dollars, there being also evidence from which the jury might infer that this money was procured in exchange or barter for that stolen. *Hicks v. State*, 169.

48. *Same; charge invading province of jury.*—A charge instructing the jury that, "the money found on the defendant's person not being the money alleged to have been stolen, he is not required to account to the satisfaction of the jury for his possession of the money found on him at the time of his arrest," is properly refused, because invasive of the province of the jury, when there is evidence from which they may infer that some of the money was part of that stolen, and some of it procured in exchange or barter of the rest, and also other evidence of guilt. *Ib.* 169.
49. *Conviction of larceny, as affecting competency or credibility of witness.*—Under statutory provisions (Code, § 2768), a conviction of larceny does not destroy the competency of a witness, but is admissible as evidence affecting his credibility. *Prior v. State*, 186.

RETAILING SPIRITUOUS LIQUORS.

50. *Local prohibitory law; constitutional provisions affecting title and subject matter.*—A local prohibitory law being entitled "An act to prohibit the sale, giving away or disposing of any spirituous, vinous or malt liquors, or intoxicating bitters, beverages or drinks, or fruits preserved in alcohol or alcoholic liquors," within the specified territory; a provision for refunding the amount paid on licenses for the current year, and appropriating money out of the public treasury for that purpose, is outside of the subject-matter expressed in the title, and is, therefore, unconstitutional and void; but a conviction may, nevertheless, be had under the punitive provisions of the statute, which are separate and distinct from the unconstitutional provision. *Bradley v. State*, 171.
51. *Selling or giving liquor to minor; negating consent of parent or guardian.*—In an indictment for selling or giving liquor to a minor (Code, § 4038), it is not necessary to negative either the consent of the parent or guardian or the prescription of a physician; but, when the indictment contains these averments, it is safer practice to prove them. *Heath v. State*, 179.
52. *What constitutes sale of liquor.*—A witness for the prosecution having testified that, on being told by a friend "where he could find something to drink," he went into the defendant's barber-shop, passed him standing in the door, found a bottle of whiskey in a box, put it in his pocket and carried it away, leaving a half-dollar on the chair; the jury may infer from these facts that a sale of the liquor was intended and consummated, though nothing was said between the parties, and the defendant did not see the witness take the bottle. But there could be no sale without the defendant's knowledge and consent, express or implied; and if he neither saw the witness take the bottle, nor knew that he took it and left the money for it, his subsequent use of the money in buying another bottle of liquor would not make him guilty. *Roberson v. State*, 189.
53. *Sufficiency of complaint.*—On an appeal to the Circuit Court, a complaint averring that the defendant "did sell spirituous, vinous or malt liquors in less quantities than one quart, within the corporate limits of the town of W., and that the same is a violation of and contrary to an ordinance of said town," setting

CRIMINAL LAW—CONTINUED.

out said ordinance, is sufficient and not demurrable. *Smith v. Town of Warrior*, 481.

TRIAL AND ITS INCIDENTS.

54. *Proof of venue.*—In a criminal case, when the bill of exceptions purports to set out all the evidence, and does not show that the venue was proved, the defendant is entitled to the general charge on the evidence, and its refusal is reversible error. *Justice v. State*, 180.
55. *Description of case in judgment nisi and sci. fa.*—In proceedings against bail on a forfeited recognizance, great particularity is not required, and technical objections for want of form are not available, if the particular case is made to appear to the court (Code, § 4481); and where the name of the case is correctly stated in the judgment *nisi* and the *scire facias*, followed by the words "*Indictment for burglary*," it is not necessary that they should recite, as a fact, that an indictment for burglary has been found. *Holcombe v. State*, 185.
56. *Order for bail after transfer of defendant for safe-keeping to another county.*—When the custody of the defendant, after commitment but before indictment found, is transferred to another county for safe-keeping, and he there makes application for bail, the order admitting him to bail is properly indorsed on the copy-warrant annexed to the sheriff's return and, if it requires the bail-bond to be "payable and conditioned as required by law," it sufficiently shows that he is required to appear at the proper court of the county in which he was committed, although it does not specify the name of the particular court or county. *Ib.* 185.
57. *Same.*—In such case, the order admitting to bail is properly addressed and given to the sheriff who has the defendant in his custody, and bail is to be taken by him, although it binds the defendant to appear and answer an indictment in the county in which he was committed. *Ib.* 185.
58. *Warrant of arrest.*—A warrant of arrest issued by a justice of the peace, directed to "any lawful officer of the State," is in proper form (Crim. Code, §§ 4259, 4397); and if made returnable to the "Pike County Criminal Court," instead of the "Criminal Court of Pike county," the variance is immaterial. *Wilson v. State*, 194.
59. *Defects in warrant of arrest*, in matters of form, are not sufficient to quash the complaint, or affidavit on which the prosecution is founded. *Ib.* 194.
60. *Objections to indictment, going to formation of grand jury.*—When the record shows that the grand jurors were regularly drawn and summoned, a mistake of the clerk in transcribing one of their names, as writing *Free* for *Firee*, is not good matter for a plea in abatement to an indictment (Code, § 4445); nor is it good matter for a plea in abatement, that the places of absent jurors were supplied by talesman without an order discharging them. *Germolgez v. State*, 216.
61. *Same; indorsement of foreman's name, and names of witnesses.*—It is not good matter for a plea in abatement to an indictment, that in indorsing the name of the foreman of the grand jury only the initials of his christian name are given, instead of the full name; nor is it good matter for such plea, that after the indictment was filed in court the solicitor indorsed on it, without leave of the court, and without the consent of the defendant,

CRIMINAL LAW—CONTINUED.

- the names of persons as witnesses before the grand jury. *Ib.* 216.
62. *Testimony of witness not before grand jury.*—In a criminal case a conviction may be had on the testimony of a witness who was not before the grand jury, and without producing the witness on whose testimony the indictment was found. *Ib.* 216.
63. *Argument of counsel to jury.*—In argument to the jury in a criminal case, counsel should not be restricted by a narrow or rigid rule, but should be allowed reasonable license in discussing the evidence and inferences to be drawn from it, but should not be allowed to state as fact that of which there is no evidence, and which would not be relevant evidence if offered; and if counsel are allowed to exceed this limit, against the objection and exception of the defendant, in a matter which may prejudice, it is reversible error. *Dollar v. State* 236.
64. *Same.*—On a prosecution for selling liquor to a minor, it is not permissible for the solicitor to state to the jury, against the objection and exception of the defendant, that their town is worse cursed with the illegal sale of whiskey than any other place known to him, that they are trying to build up a school there, and that parents will not send their children to school in a place where they can get whiskey at every corner; but the defendant's counsel having commented on the fact that solicitor's fee on a conviction for selling liquor to a minor was five times as great as on a conviction for selling without a license, the solicitor may state, in reply, that he would willingly "give up all of his fees in the liquor cases if he could put down the accursed traffic." *Ib.* 236.

WARRANT OF ARREST.

65. *Warrant of arrest.*—A warrant of arrest issued by a justice of the peace, directed to "any lawful officer of the State," is in proper form (Crim. Code. §§ 4259, 4397); and if made returnable to the "Pike County Criminal Court," instead of the "Criminal Court of Pike county," the variance is immaterial. *Wilson v. State*, 194.
66. *Defects in warrant of arrest*, in matters of form, are not sufficient to quash the complaint or affidavit on which the prosecution is founded. *Ib.* 194.

CUSTOM AND USAGE.

1. *Evidence of custom and practice; when inadmissible.*—Custom and practice can not justify the doing of an act which is negligent *per se*; and the evidence of such a custom and practice is inadmissible. *Andrews v. B'gham Min. R. R. Co.*, 433.
2. *Common carrier; custom of receiving and discharging passengers at a place other than a regular station.*—If a common carrier is in the habit, or has the custom of receiving and discharging passengers at a place other than a regular station on its road, a passenger, who knowing of such custom, attempts to board a train at such place, is as much justified in the assumption that the carrier's cars are in a safe condition, as he would be were he attempting to board them at a regular station. *North B'gham Railway Co. v. Liddicoat*, 545.
3. *Custom of well regulated road no excuse for violation of defendant's rules.*—When the rules of a defendant railroad forbid the making of "running switches," it is no excuse for, and does not relieve the said company from, negligence imputed, when injury results from the violation of such rules, that other well regulated roads are in the habit of making running switches. *L. & N. R. R. Co. v. Davis*, 593.

DAMAGES.

1. *Suit on garnishment bond; injury to credit by issuance of garnishment not recoverable.*—While the refusal of the court to instruct the jury that "Damages for injury to credit, resulting solely from the failure of plaintiff to get the amount suspended by the garnishment, are not recoverable in this suit" on the garnishment bond, may be error, it is not available to defendant when the complaint counts on injury done to plaintiff's credit by tying up in the hands of the garnishee the money due him, and issue is joined on such a count, and the plaintiff, without objection, introduces evidence to support it.—*Ala. St. L'd Co. v. Reed*, 19.
2. *Injuries to abutting property by building railroad in street; when action lies.*—When a corporation, authorized by its charter to build a railroad along certain streets, has, in the construction of its railroad, injured property abutting on such streets, without first paying compensation for such injury, an action at law will lie for the redress of such wrong. *H. A. & B. R. R. Co. v. Matthews, et al.*, 24.
3. *Same; demurrer to complaint.*—In an action to recover such damages, a demurrer to a complaint, which states a good cause of action, is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damage for the injury alleged. *Ib.* 24.
4. *Damages for breach of contract to lend or advance money.*—Under a written contract by which defendants agreed to sell and convey to plaintiff a vacant lot, and to advance to her \$300 to build a house on it; \$150, about one-fourth part of the agreed purchase-money, being payable in advance, and the residue in monthly instalments of \$8.50, which was also agreed on as the "monthly rental value of the premises," although the vacant lot had no rental value whatever; defendants having become insolvent, and made an assignment for the benefit of their creditors, after receiving the cash payment and several monthly instalments; held, that plaintiff could recover only nominal damages for their failure to advance the \$300 to build a house, and could not be allowed to prove, as affecting the question of damages, that the value of the vacant lot was much less than the agreed price. *Gooden v. Moses Bros.*, 230.
5. *Damages for mental anguish caused by negligent failure to transmit telegram.*—Plaintiff having sent a telegraphic message to his brother's wife in a distant town, inquiring about the condition of his mother, who was very ill, and asking for an immediate answer, and his brother replying to the message; he may recover damages for his mental anguish and distress on account of negligent delay in the transmission of the reply message, which prevented his arrival at his mother's bedside until several hours after her death. *West. Un. Tel. Co. v. Cunningham*, 814.
6. *Common carrier; liability for all damage referrible to negligent delay in transportation.*—A common carrier, guilty of negligent delay in the transportation of live stock, is liable for all damages resulting from the effect of such delay upon the physical condition of the stock, or from their viciousness aroused by the unnecessary confinement incident thereto. *R. & D. R. Co. v. Trousdale & Sons*, 389.
7. *Action for damages; averments of complaint.*—In an action against a railroad company for injuries, alleged to have been suffered by the plaintiff while attempting to board a train, by reason of a handle on one of the cars giving way, it is necessary that the

DAMAGES—CONTINUED.

complaint should aver that the plaintiff attempted to board the train at a station provided for passengers, or at a place where it is usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the car, or that he was, in some manner, accepted as a passenger. *North Birmingham Railway Co. v. Liddicoat*, 546.

MEASURE OF DAMAGES.

8. *Injury to abutting property by building railroad in street; measure of damages.*—The measure of damages for injury caused to abutting property by the construction of a railroad in a street is the difference in the market value of the property before and after the act complained of; and the amount of the damage, so ascertained, can not be diminished by the fact that property along the line of the railroad appreciated in value, or was generally benefitted by its construction. *H. A. & B. R. R. Co. v. Matthews*, 24.
9. *Measure of damages; profits under a contract.*—When in an action for the breach of a contract, by the defendant preventing the plaintiffs from completing the work commenced thereunder, it is shown that if they had been permitted to complete the said work the plaintiffs would have realized a profit, the measure of damages recoverable is that sum which is shown would have been realized as profits, if they had been permitted to complete their contract. *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.
10. *Same; charge to jury.*—An instruction that profits which would reasonably have been realized but for the defendant's default, are recoverable, but not those which were speculative, contingent, probable or remote, is erroneous, in making an improper use of the word "probable;" since reasonably probable profits might be recoverable. *Ib.* 331.
11. *Same.*—A charge to the jury forbidding the recovery of profits, "Unless the jury believe from the evidence that the profits claimed are certain," is erroneous; reasonable certainty being sufficient to justify a recovery. *Ib.* 331.
12. *Action on contract of affreightment; measure of damages.*—In an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, the measure of damages is the difference in the market value of said stock at the place of consignment, if they had been delivered without any delay, and their market value after their delivery at such place in the condition they were shown to be by the evidence. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
13. *Charge to the jury; nominal damages.*—In an action for damages caused by negligent delay in transporting freight, a charge to the jury that seeks to limit the plaintiff's recovery to nominal damages, on the theory that by ordinary prudence the injury complained of could have been repaired, is affirmatively bad, if, for aught that is hypothesized in said charge, the plaintiff might have been put to great trouble and expense in repairing the injury to his property caused by defendant's negligence. *Ib.* 389.
14. *Breach of contract; measure of damages.*—In an action for the breach of a contract not to engage in a certain business, the fact that in the purchase price paid by plaintiff there was in-

DAMAGES—CONTINUED.

- cluded the value of an unexpired license to conduct such business issued to the defendant, constitutes no element of damage, and can exert no influence upon the question of the extent and amount of damage suffered by plaintiff by reason of the breach complained of. *Howard v. Taylor*, 450.
15. *Same*.—In an action to recover for the alleged breach of a contract, entered into by defendant on selling his business to plaintiff, in which he agreed not to carry on a similar business in the same town, evidence that plaintiff's business had fallen off greatly after defendant opened up at another place in the same town, and that defendant's old customers returned to him, furnishes no data, by which the jury could possibly arrive at the amount of plaintiff's damages; and on such evidence he can only be entitled to nominal damages. *Ib.* 450.
 16. *Calculation of damages; what to be considered*.—When, in an action to recover damages for personal injuries, the evidence shows the age of the plaintiff, his expectancy of life according to the mortality tables, the rate of his earnings before the injury, his subsequent disability to labor, his helpless condition and suffering endured, all of these facts must be considered by the jury in the calculation of the damages to be awarded; and charges which are predicated upon facts disclosed in annuity tables introduced in evidence, to the exclusion of these other facts of the case, are properly refused. *L. & N. R. R. Co. v. Davis*, 593.

PUNITIVE DAMAGES.

17. *Punitive damages*.—If the agent of the telegraph company, receiving a reply mess age for transmission, knew the urgent necessity for promptness in forwarding it, but delayed to send it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinces an utter disregard of the feelings and rights of the plaintiff; and if they so determine, they may award punitive damages. *West. Un. Tel. Co. v. Cunningham*, 314.
18. *Damages not excessive*.—The award of \$500 as damages by the jury can not be considered excessive, when the plaintiff was prevented by the delay from reaching his mother's bedside until after her death, and the evidence shows such gross negligence as would have authorized the jury to give punitive damages. *Ib.* 314.
19. *Punitive damages*.—In an action against two railroad companies for injuries caused by a collision, at a point where the two roads intersect, when there is evidence tending to show that the speed of one of the trains at the time of the accident was 30 or 40 miles per hour, that such train was not brought to a full stop near the crossing, as required by statute, never slackened its speed when it approached such crossing, and that the engines of both trains were in plain view when the rapidly moving engine was 150 feet away from the crossing, it is open to the jury to conclude that there was wantonness, wilfulness and reckless indifference to probable consequences on the part of the engineer on such engine, and the question of punitive damages is properly submitted to the jury. *R. & D. R. R. Co. v. Greenwood*, 501.
20. *Same; actual knowledge of danger not necessary to recover such damages*.—If an engineer who knows the location of the crossing of his road by another road, and that the physical conformation of the locality prevents his seeing trains on the other road,

DAMAGES—CONTINUED.

until too close to prevent a collision, unless he has complied with the statute requiring all trains to stop within 100 feet of the crossing, and he neglects to stop as required by statute, runs his train upon the crossing without even slackening its speed of thirty or forty miles per hour, and a collision ensues, he is guilty of such wanton and reckless conduct as imposes upon the railroad the liability for punitive damages, notwithstanding he may have had no actual knowledge of the approach of train on the other road. *Ib.* 501.

DEBT.

1. *Debt; arises when one pays a debt for another.*—A valid debt against a person may be created as well by paying off his debts to others, at his instance and request, as by advancing money directly to him. *Howell v. Carden*, 100.
2. *Evidence as to payment of debts admissible.*—It is admissible for a grantee in a deed of trust, attacked as fraudulent, to testify that he had paid debts for the grantor, at his request, and that the money so paid constituted a part of the consideration for the note and deed of trust. *Ib.* 100.

DEEDS.

1. *Construction of deed.*—In the construction of a deed, the controlling inquiry is the intention of the grantor, and in ascertaining such intent the deed is to be interpreted as a whole, and the subject matter and the surrounding circumstances are to be considered; and if the deed bears on its face evidence that it was drawn up by an unskilled draughtsman, unacquainted with the technical meaning and force of the terms used, greater latitude of construction must be indulged than in cases where the instrument appears to be skillfully drawn. *Sulliran v. McLaughlin*, 60.
2. *When "heirs of her body" are terms of purchase.*—In a deed of gift from a husband, in which he conveys to his wife "and the heirs of her body by myself as husband," especially excluding in said deeds all rights of inheritance or other rights of the heirs of the wife by any other person, and when there were living children of the grantor by his said wife at the time of the conveyance, the terms used must be construed, not as words of limitation and inheritance, but as descriptive of a class of persons to take under the deed as purchasers; and the estate so created in the wife is not an estate tail. *Ib.* 60.
3. *Deed of trust, recitals of consideration not evidence against attacking creditor.*—The validity of a deed of trust, being assailed by a creditor whose debt was in existence at the time of its execution, its recitals of a consideration are not evidence against him. *Howell v. Carden*, 100.
4. *Same; burden of proof.*—In a statutory claim suit, where the claimant claims under a deed of trust, the validity of which is assailed by a creditor, whose debt was in existence at the time of its execution, the burden is on the claimant to prove the existence of the alleged debt, and the statements in the note and deed of trust are not available for this purpose. *Ib.* 100.
5. *Same; admissibility of deed as evidence.*—This rule does not justify the entire exclusion of the deed of trust and the note secured by it from evidence in a claim suit founded upon them. The recitals of a consideration are admissible to prove the fact of the existence of these instruments, so as to show that, as be-

DEEDS—CONTINUED.

- tween the grantor and claimant (trustee), there had been an effectual transfer of title to the property claimed; and the instruments themselves are admissible, in connection with other evidence afterwards adduced, as tending to show valuable and sufficient consideration, which was necessary in order to support a claim as against an attacking creditor. *Ib.* 100.
6. *Testimony concerning other notes than the one in question; when competent.*—It is competent for a grantee in a deed of trust, given to secure a note held by him, to testify concerning other notes he formerly held against the grantor, without producing said notes, their existence being a collateral matter. *Ib.* 100.
 7. *Evidence; when inquiry as to value of property material.*—Where a deed of trust is attacked as fraudulent against the grantor's creditors, the inquiry as to the value of the property conveyed in said deed is material upon the question of the good faith of the transaction. *Ib.* 100.
 8. *Recorded mortgage of personal property not void because mortgagor is left in possession.*—A recorded mortgage of personal property is not void as against non-secured creditors by reason of the mortgagor being left in possession; the recording being regarded as a substitute for the change of possession. *Ib.* 100.
 9. *Deed of trust attacked as fraudulent; burden of proof.*—When a creditor, attacking a deed of trust given to secure a debt of the grantor as fraudulent against the grantor's creditors, proves the existence of his debt at the time the deed was executed, the onus is cast upon the grantee to prove that the debt which the deed purports to secure was justly due at the time of its execution; but if the attacking creditor goes further and seeks to show that the deed was made with the intent to hinder, delay or defraud the grantor's creditors, the burden of proving this intent is upon such attacking creditor. *Ib.* 100.
 10. *Deed of trust not invalidated by provision allowing grantor to retain possession of the property.*—A provision in a deed of trust, allowing the grantor to retain possession of the property conveyed, is not such a reservation of benefit to him as invalidates the instrument against his existing or subsequent creditors, if the debt which the instrument purports to secure was justly due, and the grantee was not a party to any intent to use the instrument to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 11. *Deed of trust given to secure bona fide debt not void, although hindering, delaying or defending the grantor's creditors.*—Although the effect of a deed of trust is to hinder, delay or defraud the grantor's creditors, and he executed the instrument with that purpose, yet, if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a bona fide debt to the amount named in the instrument, the deed of trust is not void, either because of its effects upon the rights of other creditors, or because of the fraudulent purpose of the grantor. *Ib.* 100.
 12. *Validity of deed of trust; proper inquiries; what can be shown.* On inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; that the deed covered substantially all of grantor's property, and greatly more than enough to secure grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt;

DEEDS—CONTINUED.

that the grantor was allowed to retain and use the property and that the property so retained and used was either perishable, or of such a character as to be profitable in its use. A deed of trust can not be pronounced invalid unless the jury find, from the evidence, that it was made either in trust for the use of the grantor, or with the intent, participated in by the grantee, to hinder, delay or defraud the grantor's creditors. *Ib.* 100.

DEFAMATION. See CRIMINAL LAW, 16.

DISTURBING RELIGIOUS WORSHIP. See CRIMINAL LAW, 17.

DEPOSITIONS.

1. *Depositions as part of a bill of exceptions.*—Depositions taken in a cause, different from documentary evidence used on the trial, are sufficiently identified, when referred to in the bill of exceptions by the names of the witnesses; and, when being so referred to, are transcribed in the bill of exceptions, they will be considered as parts thereof. *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 831.
2. *Objection to answers to interrogatories.*—When depositions of witnesses are taken on interrogatories, and no objections are filed to such interrogatories, objections to the answers, if responsive, come too late when raised during the trial, and are properly overruled. *R. & D. R. R. Co. v. Greenwood*, 501.
3. *Objection to depositions.*—Although a deposition is taken without the affidavit required by section 2802 of the Code being made, it should not be excluded on objection and motion made to it after the commencement of the trial. *Moody v. A. G. S. R. R. Co.*, 553.

DESCRIPTION OF PROPERTY.

1. *Sufficient description of personal property in a mortgage.*—A mortgage on real estate and certain designated personal property, "and other implements," constituting a mining out-fit, "now at the mine known as the P. Mine," contains a sufficient description of the personalty so conveyed, as to render it capable of ascertainment, though such description does not of itself identify all of the personalty. *Cooper v. Berney Nat. Bank*, 119.
2. *Variance in description of land.*—Where the land sued for is described in the complaint, and also in the judgment-entry, by fractional subdivisions of a section aggregating 180 acres, the verdict being for the land sued for, while the plaintiff's documentary evidence conveys fractional subdivisions aggregating only 160 or 140 acres, the plaintiff is not entitled to the general charge on the evidence, and the judgment in his favor is erroneous. *DeArmond v. Whitaker*, 252.

DETINUE.

1. *Detinue; possession in defendant necessary to maintain action.*—To maintain an action of detinue, it must be shown that the defendant, at the time the writ was sued out, had the actual possession or controlling power over the property, and the plaintiff is not entitled to recover if it should appear that the defendant was in possession of the property sued for as the bailee of the sheriff, who had levied a writ of attachment upon such property. *Kyle v. Swem*, 573.

DEVISE.

1. *Devise to executor in trust for special purposes, creates a personal trust; enforced by a court of equity.*—A devise to executors "hereinafter named, in trust for uses and purposes," with special directions as to the management of the testator's property and for its ultimate distribution among the devisees under the will, creates in the executor a personal trust, as distinct from executorial duties; and for the enforcement of such a trust resort must be had to a court of equity, a Probate Court having no jurisdiction over it. *Creamer v. Holbrook*, 51.

EJECTMENT.

1. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void as against the adverse possessor and the persons in privity with him, and will not support ejectment by the grantee against such adverse holder. But as to all others, and as between the parties themselves, it is valid and operative. *Pearson v. King*, 125.
2. *Right of grantee to use grantor's name in an action of ejectment.*—A conveyance of land adversely held authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property; and the grantor can not prevent such use of his name by the grantee. *Ib.* 125.
3. *Same.*—The grantor in a conveyance of land held adversely can not, by a subsequent release or conveyance to the adverse holder, or by an order to dismiss, defeat an action of ejectment brought in his name for the recovery of the land from the adverse holder, for the benefit of the first grantee. *Ib.* 125.
4. *Variance in description of land.*—When the land sued for is described in the complaint, and also in the judgment-entry, by fractional subdivisions of a section aggregating 180 acres, the verdict being for the land sued for, while the plaintiff's documentary evidence conveys fractional subdivisions aggregating only 160 or 140 acres, the plaintiff is not entitled to the general charge on the evidence, and the judgment in his favor is erroneous. *DeArmond v. Whitaker*, 252.
5. *Adverse possession; admissibility of agreement by tenant to remain in possession.*—In ejectment where the issue is adverse possession, the defendant can prove an agreement with the tenant of his predecessor in title, by which the said tenant remained in possession as the defendant's tenant. *Ala. State Land Co v. Kyle*, 474.
6. *Pleadings in an action of ejectment.*—In an action of ejectment the defendant may withdraw his plea of not guilty and file a demurrer to the complaint. *Burbaum v. McCorley*, 537.
7. *Same; plea of not guilty and disclaimer.*—A plea of not guilty and a plea of disclaimer present incompatible defenses, and can not properly be pleaded together as defenses to the same action of ejectment. *Ib.* 537.
8. *Action of ejectment; judgment therein carries costs.*—In an action of ejectment, where there is a plea of disclaimer, and it is shown by the evidence that the defendant has never claimed title to, or ownership of the lands sued for, but that he was in actual possession of a small part of the land in controversy, his plea of disclaimer was to this extent not sustained, and the court in rendering judgment for the plaintiff should have allowed him his costs. *Ib.* 537.

ESTOPPEL.

1. *Sale under decree of Probate Court; estoppel.*—When lands are sold under a decree of the Probate Court, and the purchase money is received by the administrator, and accounted for in his administration, the sale, in a court of equity, will be treated as valid, and the parties estopped from impeaching it. *Oden v. Dupuy*, 36.
2. *Same.*—One who receives and retains the proceeds of property sold, even though sold without authority, is estopped from claiming the property itself. To receive and retain the proceeds is a ratification of the unauthorized sale. *Ib.* 36.
3. *Sale of decedent's lands; estoppel.*—Persons who are parties to the final settlement of an executorship are estopped, so long as such settlement remains unimpeached by direct attack, from claiming in a court of equity the same lands, from the sale of which they received the benefit, and the proceeds of which were fully accounted for to them on such final settlement. *Cremer v. Holbrook*, 52.
4. *Estoppel.*—When the respondent to a bill to set aside a sale under a mortgage claims title to and through a purchaser at the mortgage sale, the mortgage having been executed by the grantor of the complainant, he is estopped from denying that the mortgagor had title to the land, he being the common source of title to both parties. *Sullivan v. McLaughlin*, 60.
5. *Estoppel of carrier.*—As between a railroad company issuing a bill of lading, regular on its face, and one who shows himself to be the *bona fide* transferee or purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in such receipt. *Jasper Trust Co. v. K. C., M. & B. R. R. Co.*, 416.
6. *False representation; estoppel.*—Where one represents to another that he has money in his possession which is claimed by the latter, but says he will not pay it over until the conflicting claims thereto have been decided by the courts, and by reason of such a representation the latter is induced to institute suit for the recovery of the money, the former is estopped from saying in the action so induced that he did not, in fact, have the money. *Myers v. Byars*, 484.
7. *Effect of decree on appeal; complainant estopped.*—When in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Bolling & Son v. Pace*, 607.

EVIDENCE

ADMISSIBILITY AND RELEVANCY.

1. *Action on garnishment bond; limitation of admitted evidence.*—In a suit on a garnishment bond which had been executed for the issuance of a writ of garnishment in an action to recover the statutory penalty for willfully and knowingly cutting down trees on the lands of another (Code, § 3296), it furnishes no

EVIDENCE—CONTINUED

- ground of complaint to defendant, after allowing the defendant's agent, who sued out the garnishment in the former suit, to testify that he found a person cutting trees on defendant's land, who told witness that he was cutting for plaintiff, that the court should limit this evidence to the question of the vexatious or malicious suing out of the writ of garnishment, when there is no offer to connect plaintiff with such act of cutting further than by the declaration itself. *Ala. St. Land Co. v. Reed*, 19.
2. *Evidence; contradictory statements.*—While contradictory statements made by a witness, when unexplained, may affect his credibility, they do not, of themselves, render the statements incompetent as evidence. *Joseph, Gaboury & Co. v. Southwork F. & M. Co.*, 47.
 3. *Inadmissible evidence.*—A letter written by an attorney for the plaintiff in execution, forbidding the release of property from the levy of execution, can have no effect upon the duty of the sheriff and is inadmissible as evidence. *Kennedy v. Smith*, 84.
 4. *Testimony concerning other notes than the one in question; when competent.*—It is competent for a grantee in a deed of trust, given to secure a note held by him, to testify concerning other notes he formerly held against the grantor, without producing said notes, their existence being a collateral matter. *Howell v. Carden*, 100.
 5. *Evidence as to payment of debts admissible.*—It is admissible for a grantee in a deed of trust, attacked as fraudulent, to testify that he had paid debts for the grantor, at his request, and that the money so paid constituted a part of the consideration for the note and deed of trust. *Ib.* 100.
 6. *Evidence; when inquiry as to value of property material.*—Where a deed of trust is attacked as fraudulent against the grantor's creditor's, the inquiry as to the value of the property conveyed in said deed is material upon the question of the good faith of the transaction. *Ib.* 100.
 7. *Same; use of memoranda to refresh memory of witness.*—It is not permissible for a witness, against the objection of the adverse party, to use for the purpose of refreshing his memory, memoranda made a long time after the date of the transaction to which it referred. *Ib.* 100.
 8. *Validity of deed of trust; proper inquiries; what can be shown.* On inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; that the deed covered substantially all of grantor's property, and greatly more than enough to secure grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt; that the grantor was allowed to retain and use the property, and that the property so retained and used was either perishable, or of such a character as to be profitable in its use. A deed of trust can not be pronounced invalid unless the jury find, from the evidence, that it was made either in trust for the use of the grantor, or with the intent, participated in by the grantee, to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 9. *Error without injury in rulings on evidence.*—On appeal from a judgment of non-suit, this court will not consider the correctness of rulings on evidence to which exceptions were reserved,

EVIDENCE—CONTINUED

- and on account of which the non-suit was taken, when the record shows that the plaintiff can not recover in any event. *Harmon & Son v. Siler*, 306.
10. *Evidence; irrelevant testimony.*—In an action by a brakeman against a railroad company to recover damages for personal injuries, alleged to have been caused by the negligence of the engineer, in backing his train with too much force, while the plaintiff was uncoupling cars in the discharge of his duties, testimony that there were no brakemen on the train at the time of the accident, and that if there had been other brakemen on the train, and they had applied the brakes, the accident could have been averted, is irrelevant, and its admission is error. *A. G. S. R. R. Co. v. Richie*, 346.
 11. *Evidence of custom; when not relevant.*—In an action against a common carrier for injury to stock caused by delay in transporting them, evidence as to "what was the custom in such cases as to some one going along with the stock," is irrelevant. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
 12. *Evidence of intention not admissible; objection thereto may be waived.*—Evidence of one's intention is not admissible; but where intention is the fact to be ascertained, the objection to proving it by the testimony of the person himself may be waived, and when so proven the evidence is legal and relevant. *Fuller v. Whitlock*, 411.
 13. *Evidence; proof of other breaches than those specified not admissible.* Where a lessor has notified his lessee that the contract of lease has been forfeited, by reason of the breach of certain specified covenants therein, he cannot, in an action founded upon such forfeiture, introduce evidence of the breach of other and wholly different covenants in the contract of lease. *Brooks v. Rogers*, 433.
 14. *Evidence of custom and practice; when admissible.*—Custom and practice cannot justify the doing of an act which is negligent *per se*, and the evidence of such custom and practice is inadmissible. *Andrews v. B'gham Min. R. R. Co.*, 436.
 15. *Evidence; admissibility of copy of certificate.*—The original of a certificate of entry, being shown to be without the jurisdiction of the court, a copy thereof, duly established by evidence as such, is admissible in evidence. *Ala. State Land Co. v. Kyle*, 474.
 16. *Same; when certificate of entry admissible to show color of title without proof of execution.*—On the trial of an issue as to adverse possession by defendant, a certificate of entry to his grantor, in connection with other evidence that he actually held possession and claimed title under it, is admissible in evidence, without proof of its execution, as color of title to fix the boundaries of defendant's possession. *Ib.* 474.
 17. *Same; admissibility of agreement by tenant to remain in possession.* In ejectment where the issue is adverse possession, the defendant can prove an agreement with the tenant of his predecessor in title, by which the said tenant remained in possession as the defendant's tenant. *Ib.* 474.
 18. *Evidence; payment of taxes.*—In determining whether the possession of certain lands by one, who admits a former permissive holding, has become adverse, evidence showing payment of taxes on said lands by said holder, and that he scheduled the said lands in a bankruptcy proceedings by him, is competent as tending to show the character of his subsequent possession. *Trufant v. White & Co.*, 526.

EVIDENCE—CONTINUED.

19. *Action against a corporation; evidence of consolidation.*—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property, &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to prove that the negligent corporation had been merged into the defendant. *Zealy v. B'gham Railway & Electric Co.*, 579.

BURDEN OF PROOF.

20. *Action on garnishment bond; burden of proof to sustain plea of set-off.* In order to sustain a plea claiming as a set-off to a recovery on a garnishment bond the statutory penalty originally sued for by defendant, the burden is on the defendant to reasonably satisfy the jury that plaintiff willfully and knowingly cut the trees, or had them cut. *Alabama State Land Co. v. Reed*, 19.
21. *Burden of proof on plaintiff to show that defendant had other property in the county.*—If the defendant in execution has a leviable interest in any other property in the county than that levied upon, the burden is upon the plaintiff to prove such fact, and that the sheriff could, with due diligence, have made the money due on the execution by a levy on such property. *Kennedy v. Smith*, 84.
22. *Burden of proof on sheriff to show property not subject to execution.* In a proceeding against the sheriff for a failure to collect money under an execution, where the sheriff has been indemnified, he assumes, by failing to sell, the burden of showing that the property was not subject to levy and sale under the execution. *Ib.* 84.
23. *Deed of trust; burden of proof.*—In a statutory claim suit, where the claimant claims under a deed of trust, the validity of which is assailed by a creditor, whose debt was in existence at the time of its execution, the burden is on the claimant to prove the existence of the alleged debt, and the statements in the note and deed of trust are not available for this purpose. *Howell v. Carden*, 100.
24. *Deed of trust attacked as fraudulent; burden of proof.*—When a creditor, attacking a deed of trust given to secure a debt of the grantor as fraudulent against the grantor's creditors, proves the existence of his debt at the time the deed was executed, the onus is cast upon the grantee to prove that the debt which the deed purports to secure was justly due at the time of its execution; but if the attacking creditor goes further and seeks to show that the deed was made with the intent to hinder, delay or defraud the grantor's creditors, the burden of proving this intent is upon such attacking creditor. *Ib.* 100.
25. *Burden of proof as to cause or time of injuries; general charge on evidence.*—When the action is against a railroad company which, receiving the stock from the original company, delivered

EVIDENCE—CONTINUED.

them at their destination, and counts on injuries resulting from the negligence of the defendant's servants, the *onus* is on the plaintiff to prove that the animals were in good condition when received by it; but, if the evidence is conflicting as to their condition at that time, the defendant is not entitled to the general affirmative charge. *L. & N. R. R. Co. v. Grant & Richardson*, 325.

26. *Action for breach of contract of affreightment; burden of proof.*—If, in an action to recover damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock, it is shown that the defendant failed to deliver such stock in a safe condition, within a reasonable time, a presumption of negligence arises, and the *onus* is upon the defendant to excuse itself from negligence. *R. & D. R. R. Co. v. Trousdale & Sons*, 389.
27. *Tender; burden of proof.*—When the tender is denied, the burden of proving that the amount tendered was kept at all times in readiness to be paid upon the demand of the creditor, is upon him who pleads the tender. (Stone, C. J., dissenting.) *McCalley v. Otey*, 584.

OBJECTIONS.

28. *Objection to answers to interrogatories.*—When depositions of witnesses are taken on interrogatories, and no objections are filed to such interrogatories, objection to the answers, if responsive, come too late when raised during the trial, and are properly overruled. *R. & D. R. R. Co. v. Greenwood*, 501.

OPINION.

29. *Opinion of experienced railroad man; competent evidence.*—A witness, who is shown to have been "railroading for ten years," is competent to testify whether "a man with one arm would be as good and competent a brakeman as a man with two." *L. & N. R. R. Co. v. Davis*, 593.

PAROL AND WRITTEN.

30. *Deed of trust; recitals of consideration not evidence against attacking creditor.*—The validity of a deed of trust being assailed by a creditor, whose debt was in existence at the time of its execution, its recitals of a consideration are not evidence against him. *Howell v. Corden*, 100.
31. *Same; admissibility of deed as evidence.*—This rule does not justify the entire exclusion of the deed of trust and the note secured by it from evidence in a claim suit founded upon them. The recitals of a consideration are admissible to prove the fact of the existence of these instruments, so as to show that, as between the grantor and claimant (trustee), there had been an effectual transfer of title to the property claimed; and the instruments themselves are admissible, in connection with other evidence afterwards adduced, as tending to show valuable and sufficient consideration, which was necessary in order to support a claim as against an attacking creditor. *Ib.* 100.
32. *Written estimates of civil engineers; when inadmissible evidence.*—In an action by contractors for an alleged breach, in preventing the completion of their contract, written estimates made by civil engineers, after work under the contract had been begun, can not be offered in evidence upon the inquiry of the profits the plaintiffs would have realized, if they had been permitted to perform their contract. *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.

EVIDENCE—CONTINUED.

33. *Action against a corporation; evidence of consolidation.*—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property, &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to prove that the negligent corporation had been merged into the defendant. *Zealy v. B'gham Railway & El. Co.*, 579.

PRIMARY AND SECONDARY.

34. *Secondary evidence.*—When, on a trial, one of the parties fails to produce certain writings, after having been notified to do so, and it is shown that the originals thereof are out of the State, copies may be introduced. *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.

PHYSICAL EXAMINATION.

35. *Motion to require plaintiff to submit to physical examination; must be seasonably made.*—A motion to require the plaintiff to submit to a physical examination must be seasonably made; and such motion should not be granted if the result would be an unreasonable postponement of the trial, or if it would necessitate the plaintiff's presence in Alabama, when it appears that he was not reasonably equal to the journey from his home in a distant State. *R. & D. R. R. Co. v. Greenwood*, 501.

See EVIDENCE in CRIMINAL LAW.

EXECUTIONS.

1. *Prima facie liability of sheriff for the discharge of a levy.*—The fact that property was levied on under an execution as the property of the defendant, imposes a *prima facie* liability on the sheriff to the plaintiff, for the value of the property, not to exceed the injury plaintiff might sustain from the discharge of the levy; but in the absence of other proof, the statement in the exemption claim, which was offered in evidence by the plaintiff, that the only claim the defendant had to the property levied upon was a lien to secure the debt, overcomes the *prima facie* liability of the sheriff. *Kennedy v. Smith*, 83.
2. *Lien on personal property not subject to levy and sale under execution.*—A mere lien on property, in favor of the defendant in execution, is not subject to levy and sale under such execution, since a lien is not "personal property of the defendant," within the meaning of the statute (Code, § 2892). *Ib.* 83.
3. *Burden of proof on sheriff to show property not subject to execution.* In a proceeding against the sheriff for a failure to collect money under an execution, where the sheriff has been indemnified, he assumes, by failing to sell, the burden of showing the property was not subject to levy and sale, under the execution. *Ib.* 83.

EXECUTIONS—CONTINUED.

4. *Suspension of execution necessary pending re-hearing; right of court to grant the same.*—A supersedeas granted on an application for re-hearing having been set aside by the direction of this court, a judge of the Circuit Court, on proper application, should grant another supersedeas, pending the petition for re-hearing; suspension of execution of the judgment being necessary. *Ex parte Farquhar & Son*, 375.
5. *Judgment against a firm; execution thereon.*—An execution issued upon a judgement recovered against a firm only, as provided in section 2805 of the Code, can be levied only on the property of the firm. *Baldrige v. Eason*, 516.
6. *Summary execution on replevy bond; bond must be strictly statutory.* A replevy bond, to justify the issuance of a summary execution upon its return as forfeited, must follow strictly the provisions of the statute. *Harrison v. Hamner*, 603.
7. *Same; motion to quash.*—A motion to quash a summary execution issued upon a forfeited replevy bond may be acted on at any time when the court is in session, without regard to the term of the court at which the judgment in the original suit was rendered. *Ib.* 603.
8. *Same; exception to ruling thereon.*—When a motion to quash an execution, based upon several grounds, is overruled, an exception reserved to such ruling need not be several as to each of the grounds. *Ib.* 603.
9. *Purchaser at execution sale subsequent to execution of mortgage acquires only an equity, which is subordinate to vendor's lien.*—A purchaser at an execution sale, made subsequent to execution of a mortgage by the judgment debtor, acquires only the equity of redemption left in the mortgagor, and having no legal title, and his equity being subsequent in point of time to that of the mortgagor's vendor, he is not entitled to protection against the vendor's lien as a *bona fide* purchaser, though he had no knowledge or notice whatever of its existence. *Overall v. Taylor*, 12.
10. *Equitable estate purchased by mortgagee with notice does not give priority over vendor's lien.*—The fact that the mortgagees, whose title was itself subordinate to the vendor's lien, because of their knowledge of its existence, acquired the equitable estate of the purchasers at the execution sale, cannot give them priority over the vendor's lien. *Ib.* 12.

EXECUTORS AND ADMINISTRATORS.

1. *Devise to executor in trust for special purposes, creates a personal trust; enforced by a court of equity.*—A devise to executors "hereinafter named, in trust for uses and purposes," with special directions as to the management of the testator's property and for its ultimate distribution among the devisees under the will, creates in the executor a personal trust, as distinct from executorial duties; and for the enforcement of such a trust resort must be had to a court of equity, a Probate Court having no jurisdiction over it. *Creamer v. Holbrook*, 52.
2. *Testamentary trusts; jurisdiction of Probate Court.*—A Probate Court has no jurisdiction to enforce and settle a trust created by will; but if the trust is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person, as executor and as trustee, are not so blended that they can not be distinguished or separated from each other, the Probate Court has jurisdiction over the

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as the trustee under the will. *Ib.* 52.
3. *Same.*—When one person is appointed executor, and is also made the trustee under the will with powers unconnected with his ordinary duties as executor, the Probate Court can exercise the same control over him as an executor merely, as it could if he alone had been made the executor, and the special trust had been conferred upon some other person. *Ib.* 52.
 4. *Same; jurisdiction of Chancery Court.*—If a special trust or power is attached to the executorial office, and is not personal to him who is named as executor and trustee, then the Probate Court has no jurisdiction to execute the will, as the administration of the estate under the will involves the execution of a trust, which can only be enforced in a court of equity. *Ib.* 52.
 5. *Sale of decedent's lands; estoppel.*—Persons who are parties to the final settlement of an executorship are estopped, so long as such settlement remains unimpeached by direct attack, from claiming in a court of equity the same lands, from the sale of which they received the benefit, and the proceeds of which were fully accounted for to them on such final settlement. *Ib.* 52.
 6. *Parties to bill for settlement of administration.*—Infants are necessary parties to a bill which seeks a settlement of the administration of the estate of an intestate of which they are distributees, or the accounts of a partnership of which he was a member, the surviving partner being his administrator. *Parker v. Parker*, 239.
 7. *Grant of administration on estate of non-resident decedent.*—On the death in New York of a resident citizen of that State intestate, and owning a certificate for shares of stock in an Alabama corporation, the Probate Court of the county in which such corporation is located has jurisdiction to grant letters of administration on his estate (Code, § 2013, subd. 3); although an administrator appointed in New York would have authority to transfer the certificate (§ 1672), and payment of dividends might lawfully be made to him. *Winter v. London*, 263.
 8. *Petition for sale of land to pay decedent's debts; sufficient averments.* A petition by an administrator for an order to sell lands belonging to the estate of his intestate, for the payment of his debts (Code, §§ 2104, 2106), which alleges that "there is no personal property belonging to said estate with which to pay the debts of said decedent, and that it is necessary to sell the said lands to pay the debts of said estate," is sufficient to confer jurisdiction on the Probate Court to decree a sale. *Smith v. Brannon*, 445.
 9. *Action by administrator of deceased employee must be brought within one year after the cause of action accrues.*—An action against a railroad company by the administrator of a deceased employee, to recover damages for the alleged negligent killing of his intestate, must be commenced within one year after the cause of action accrued, as provided by subdiv. 6, section 2619 of the Code of 1886; and is not governed by section 2589. *O'Keif v. M. & C. R. R. Co.*, 524.

EXEMPTIONS.

1. *Exemptions; definition of personal property as used.*—The words "personal property," as used in the exemption laws, have a comprehensive signification, and as construed, embrace everything which is the subject of ownership, not realty or an interest in realty. *Kennedy v. Smith*, 83.

EXEMPTIONS—CONTINUED.

2. *Same; a debt subject thereto.*—A debt due the defendant in execution, is personal property within the meaning of the statute (Code, § 2511), and subject to a claim of exemption, to the amount allowed by statute; and that such a debt was secured by lien on other personal property, of greater value than \$1,000, does not affect the claimant's right to claim said debt as exempt. *Ib.* 83.
3. *Same; not increased by claim under a lien to property to secure a debt.* Where personal property is levied on as the property of a defendant in execution, who files a claim of exemptions to a debt of \$1,000, the fact that he claims, in addition to said debt, whatever right he had in the property levied on to secure the debt, adds nothing to the amount claimed as exempt; since, in no way, could the defendant, under his lien, derive from the property more than \$1,000. *Ib.* 83.
4. *Failure of plaintiff to file a contest of exemption; duty of sheriff to discharge the levy.*—When a claim of exemption has been filed with the sheriff to property levied on under execution, and due notice thereof given to the attorney or plaintiff in execution, and the latter fails to file a contest within the time prescribed by law, the right of the sheriff to sell under the execution ceases, notwithstanding the indemnity, and it becomes mandatory upon the sheriff under the terms of the statute, (Code, § 2521), to discharge the levy. *Ib.* 83.
5. *The right of sheriff to disregard a claim of exemption.*—A sheriff has no power to pass on the sufficiency of a claim of exemption, and can disregard no claim, unless interposed by defendant in an execution on a judgment based on a tort, or other demand against which the statute does not authorize a claim of exemption to be interposed. *Ib.* 83.
6. *Sufficiency of inventory.*—When a debtor claims as exempt a stock of goods which is in the possession of the sheriff under the levy of an attachment, it is sufficient to describe the goods in his inventory as they are described in the inventory of the sheriff. *Pinkus v. Bamberger, Bloom & Co.,* 286.
7. *Fraudulent conduct of debtor, as affecting claim of exemption.*—When the inventory filed by a debtor, claiming an exemption of personal property, is contested by attaching creditors, his fraudulent conduct in collusion with another person, who first sued out an attachment, is not relevant to the issue involved, except so far as it shows that he had other moneys or effects not included in his inventory. *Ib.* 286.
8. *Contest of inventory; what should be included in it.*—When a debtor's inventory of property claimed as exempt, which is contested by attaching creditors, includes only a stock of goods valued at less than \$1,000, and the evidence shows that their value exceeds that sum, the excess should be deducted from his claim; and if it is shown that he either received or paid out moneys, at any time between the interposition of his claim of exemption and the filing of his inventory, that amount also should be deducted; but, if it is shown that he has transferred to a creditor outstanding notes and accounts, nominally in excess of his debt, with a stipulation that any excess, if collected, shall be paid to him, he can not be charged with any excess, in the absence of evidence showing what amount has been or may be collected; yet he should state the facts in his inventory. *Ib.* 286.

EXEMPTIONS—CONTINUED.

9. *Homestead exemption; abandonment.*—Temporary absence from a homestead for less than 12 months is not an abandonment, so long as there exists in the owner the *animus revertendi*. *Fuller v. Whitlock*, 411.
10. *Same.*—When, after a claim of homestead exemption has been duly made and filed, the owner during a temporary absence leases the premises for a period less than one year, his right to such exemption is not forfeited, provided the *animus revertendi* continued to exist; and a sale of the premises within 12 months from the time of his leaving is a conveyance of the homestead. *Ib.* 411.
11. *Same; sale of, can not be impeached by creditors.*—A sale of property, exempt as a homestead, can not be impeached by creditors, and this, notwithstanding the sale may have been fraudulent, and made to hinder, delay or defraud the creditors. *Ib.* 411.
12. *Homestead exemption to widow.*—The Probate Court has jurisdiction to allot to the widow, as a homestead exemption, the lands of which her husband died seized and possessed, when (and only when) they do not exceed 160 acres in area, nor \$2,000 in value, (Sess. Acts 1884-5, p. 114); and the title of the land so allotted vests absolutely in her, as fully and completely as if the husband's estate had been declared insolvent. *DeArmond v. Whitaker*, 252.
13. *Waiver of right to exemption; not material.*—A waiver of the right to exemption by mortgagee is immaterial when a bill to foreclose the mortgage seeks no relief dependent on or referable to such waiver. *McCall v. Am. Freehold L'd Mortg. Co.*, 427.

EXPRESS COMPANY.

1. *Express company; embezzlement by agent.*—Where, through fraud or false pretenses of the agent of an express company, one is induced to deliver money to such express company to be carried and delivered by it to a fictitious firm, and the express company receives, gives its receipt for the money, carries it to the place of destination, and delivers it to such agent, who embezzles the money, the sender can recover the amount from the express company. *So. Express Co. v. Jasper Trust Co.*, 416.

FRAUDS.

1. *Fraudulent misrepresentation; averments in bill to rescind contract.* When a bill, filed to rescind the sale of land, on the ground of fraudulent concealments and misrepresentations, sets forth facts showing the particular concealments and misrepresentations relied on, and avers that these misrepresentations were as to matters material, and not the mere expression of opinion of the defendant, and that complainants were induced thereby to enter into the contract, its averments are sufficient in this regard to justify the relief asked. *Baker v. Maxwell*, 558.
2. *Same; executed contract can be rescinded therefor.*—A misrepresentation by one of the parties to a contract of sale, in regard to a material fact which operated as an inducement to the other party, upon which he had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, although wholly executed, if the attempt is seasonably made. *Ib.* 558.
3. *Averments of bill to rescind contract.*—A bill to rescind a contract, whereby the complainants conveyed to defendant certain lands, in consideration of the transfer to them of certain mortgages,

FRAUDS—CONTINUED.

on the ground of misrepresentation by defendant as to the title of the mortgagors to the realty, and the existence of the personality at the time of the mortgage, need not negative the solvency of the mortgagors, nor aver that the debts secured by the mortgages were not enforceable otherwise than by the foreclosure of the mortgages. *Ib.* 558.

4. *Same*.—A bill filed to rescind a contract for fraudulent misrepresentations which alleges that said misrepresentations were as to material facts, and were conducive to the transaction, is not demurrable on the ground that the representations were not such as the complainants had a right to rely upon, since they might, by the exercise of diligence, have ascertained their falsity. *Ib.* 558.
5. *Same; transfer to third party*.—If, in a bill to rescind a contract, whereby complainants conveyed to defendant certain land in consideration of the transfer to them of certain mortgages held by the defendant, on the ground of fraudulent misrepresentations as to the property conveyed in said mortgages, it is shown that the complainants assigned such mortgages for value and without recourse to a third person, and afterwards accepted a re-assignment without recourse on such third person, the complainants are not entitled to the relief prayed for, unless the bill further avers such facts as imposed a legal or equitable obligation on the complainants to accept such re-assignment. *Ib.* 558.
6. *Same; complainants' knowledge of the falsity of the representations*. If it is not alleged in, or inferrible from, the averments of the bill, that the complainants knew the falsity of the representations at the time of the transfer by them to such third person, they are entitled to the rescission of the contract, notwithstanding by such assignment of the mortgages, the alleged fraud was condoned, the transaction infected by it ratified, and the complainants may have been guilty of *laches* in the institution of their suit. *Ib.* 558.
7. *False representation; estoppel*.—Where one represents to another that he has money in his possession which is claimed by the latter, but says he will not pay it over until the conflicting claims thereto have been decided by the courts, and by reason of such a representation the latter is induced to institute suit for the recovery of the money, the former is estopped from saying in the action so induced that he did not, in fact, have the money. *Myers v. Byars*, 484.

FRAUDS, STATUTE OF.

1. *Contract of rent for one year*.—A contract for the rent of premises for the term of one year, to commence at a future day, is void under the statute of frauds (Code § 1732), unless reduced to writing. *Garner v. Ullman*, 218.

FRAUDULENT CONVEYANCES.

1. *Evidence; when inquiry as to value of property material*.—Where a deed of trust is attacked as fraudulent against the grantor's creditors, the inquiry as to the value of the property conveyed in said deed is material upon the question of the good faith of the transaction. *Howell v. Carden*, 100.
2. *Mortgage of personal property; when pronounced void by the court*. A court can not pronounce, as a legal conclusion, that a mortgage of personal property is fraudulent and void as to existing creditors, unless it is shown upon its face, that it was made in

FRAUDULENT CONVEYANCES—CONTINUED.

- trust for the use of the mortgagor, or with the intent to hinder, delay or defraud his creditors. *Ib.* 100.
3. *Deed of trust attacked as fraudulent; burden of proof*—When a creditor, attacking a deed of trust given to secure a debt of the grantor as fraudulent against the grantor's creditors, proves the existence of his debt at the time the deed was executed, the *onus* is cast upon the grantee to prove that the debt which the deed purports to secure was justly due at the time of its execution; but if the attacking creditor goes further and seeks to show that the deed was made with the intent to hinder, delay or defraud the grantor's creditors, the burden of proving this intent is upon such attacking creditor. *Ib.* 100.
 3. *Deed of trust not invalidated by provision allowing grantor to retain possession of property*.—A provision in a deed of trust, allowing the grantor to retain possession of the property conveyed is not such a reservation of benefit to him as invalidates the instrument against his existing or subsequent creditors, if the debt which the instrument purports to secure was justly due, and the grantee was not a party to any intent to use the instrument to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 4. *Deed of trust given to secure bona fide debt not void, although hindering, delaying or defrauding the grantor's creditors*.—Although the effect of a deed of trust is to hinder, delay or defraud the grantor's creditors and he executed the instrument with that purpose, yet if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a *bona fide* debt to the amount named in the instrument, the deed of trust is not void, either because of its effects upon the rights of other creditors, or because of the fraudulent purpose of the grantor. *Ib.* 100.
 5. *Validity of deed of trust; proper inquiries; what can be shown*.—On inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; and that the deed covered substantially all of grantor's property, and greatly more than enough to secure grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt; that the grantor was allowed to retain and use the property, and that the property so retained and used was either perishable, or of such a character as to be profitable in its use. A deed of trust cannot be pronounced invalid unless the jury find, from the evidence, that it was made either in trust for the use of the grantor, or with the intent, participated in by the grantee, to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 6. *A recorded mortgage of personal property is not void because the mortgagor is left in possession*.—A recorded mortgage conveying both realty and personal property is not invalidated as to the personality by reason of the fact that the mortgagor is left in possession of such personal property until default; the recording of a mortgage, as directed by a statute, is regarded as a substitute for a change of possession. *Cooper v. Berney National Bank*, 119.
 7. *Appointment of receiver, notwithstanding sale of property under attachment*.—The fact that non-secured creditors of a mortgagor have attached and sold the personal property mortgaged, does

FRAUDULENT CONVEYANCES—CONTINUED.

not defeat the paramount lien of the mortgage, so as to prevent the appointment of a receiver, on the application of the mortgagee, to take charge of the property; and this notwithstanding its sale under the attachment. *Ib.* 119.

8. *A creditor cannot claim under a mortgage which he attacks as fraudulent.*—A creditor, who has attacked the validity of a mortgage as having been made to defraud the mortgagor's creditors, can not insist that the mortgage so attacked, together with another previously executed, should be construed together as a general assignment for the benefit of all the mortgagor's creditors; one cannot claim both under and against a mortgage. *Ib.* 119.
9. *Mortgage given to secure a bona fide debt not void.*—Although the effect of a mortgage is to hinder, delay or defraud the mortgagor's creditors, and it was given for that purpose, yet, if the mortgagee did not participate in such intent, but accepted the mortgage for the sole purpose of securing a *bona fide* debt of the amount named in the instrument, the mortgage is not invalid because of such effect, or because of the fraudulent intent of the grantor. *Ib.* 119.
10. *Mortgage on personal property to be recorded in the county where property is located.*—A mortgage on personal property situated in this State, but executed by a non-resident, should be recorded in the county in which the property is situated. (Code, § 1806.) *Ib.* 119.
11. *Sufficient description of personal property in a mortgage.*—A mortgage on real estate and certain designated personal property, "and other implements," constituting a mining out-fit, "now at the mine known as the P. Mine," contains a sufficient description of the personalty so conveyed, as to render it capable of ascertainment, though such description does not of itself identify all of the personalty. *Ib.* 119.
12. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—When a sale of his entire stock of goods by an insolvent debtor to one of his creditors is attacked by other creditors on the ground of fraud, the only questions for consideration are, (1) the *bona fides* of the consideration paid; (2) its sufficiency, and (3) whether any benefit was reserved to the debtor; if the debt of the purchasing creditor is *bona fide* due and subsisting, its amount not much less than the reasonable value of the goods, and no benefit is reserved to the debtor, the transaction will be sustained against the attack of other creditors. *Ferguson v. Hall*, 209.
13. *Same; case at bar.*—In this case, the court examines and states the evidence, and holds the transaction valid, finding (1) that the debts of the purchasing creditors were *bona fide* due and subsisting, and amounted to \$2,825; (2) that the goods were valued at \$3,000, and were afterwards sold by the receiver in the cause for \$3,164; (3) that the sale also included the debtor's outstanding notes and accounts, which were estimated at \$850, and on which the receiver collected \$804; (4) that these were included in the sale on the urgent insistence of the debtor, in order that he might pay certain other creditors, and the money was used by him for that purpose; and (5) that no benefit was reserved to him. *Ib.* 209.
14. *Fraudulent attachments.*—In a suit in equity to set aside an attachment of an insolvent debtor's stock of goods as fraudulent, the evidence showed that the attaching creditor was the debt-

FRAUDULENT CONVEYANCES—CONTINUED.

or's head clerk, and held claims against him for money loaned and balance of salary, amounting to \$2,959; that the attaching creditor procured the transfers to him of claims against the insolvent debtor from a bank, the debtor's mother, and his prospective brother-in-law, aggregating \$6,380, for which he gave his notes; that the debtor was instrumental in having the transfers made by his mother and his prospective brother-in-law to the attaching creditor after the latter had threatened to attach; and that on the same day these transfers were made the creditor sued out an attachment for the aggregate of the claims transferred to him and his individual claim against the debtor. There was direct evidence tending to show that these claims were just, and that the attachment was in good faith, while there was nothing to impeach the transaction but the unusual and suspicious circumstances. At the sale the attaching creditor bought in the whole stock for 60 cents on the dollar. There was no positive evidence that the attaching creditor had any available means with which to make the said purchase, except the \$2,959 due him from the insolvent debtor, and the other claims transferred to him. *Held*, that the attachment should not be set aside as fraudulent and collusive. (Stone, C. J., dissenting.) *Cartwright v. Bamberger, Bloom & Co*, 822.

GAMING. See CRIMINAL LAW, 31-35.

GARNISHMENT.

1. *Action on garnishment bond; responsibility of principal for acts of agent.* A principal is not responsible for the malice, vexation or wantonness of an agent in suing out a writ of garnishment, unless the principal authorized, participated in or ratified such act; and such authority, participation or ratification can not be inferred from the mere relation of principal and agent, but must be proved. *Ala. State Ld. Co. v. Reed*, 19.
2. *Same; defense as to vexatious suing out of a writ.*—An honest belief, founded upon reasonable grounds, that a writ of garnishment was necessary, may furnish a defense against a recovery for vexatious suing out of the writ; but is no answer to the claim for actual damages sustained by the wrongful suing out of the writ. *Ib.* 19.

GARNISHMENT BOND.

1. *Action on garnishment bond; limitation of admitted evidence.*—In a suit on a garnishment bond which had been executed for the issuance of a writ of garnishment in an action to recover the statutory penalty for willfully and knowingly cutting down trees on the lands of another (Code, § 3296), it furnishes no ground of complaint to defendant, after allowing defendant's agent, who sued out the garnishment in the former suit, to testify that he found a person cutting trees on defendant's land, who told witness that he was cutting for plaintiff, that the court should limit this evidence to the question of the vexatious or malicious suing out of the writ of garnishment, when there is no offer to connect plaintiff with such act of cutting further than by the declaration itself. *Ala. State Ld. Co. v. Reed*, 19.
2. *Same; burden of proof to sustain plea of set-off.*—In order to sustain a plea claiming as a set-off to recovery on a garnishment bond the statutory penalty originally sued for by defendant,

GARNISHMENT BOND—CONTINUED.

- the burden is on the defendant to reasonably satisfy the jury that plaintiff willfully and knowingly cut the trees, or had them cut. *Ib.* 19.
3. *Same; injury to credit by issuance of garnishment not recoverable.* While the refusal of the court to instruct the jury that "Damages for injury to credit, resulting solely from the failure of plaintiff to get the amount suspended by the garnishment, are not recoverable in this suit" on the garnishment bond, may be error, it is not available to defendant when the complaint counts on injury done to plaintiff's credit by tying up in the hands of the garnishee the money due him, and issue is joined on such a count, and the plaintiff, without objection, introduces evidence to support it. *Ib.* 19.
 4. *Same; misleading charge.*—The taking of a non-suit is not conclusive of the fact of indebtedness *vel non*; and a charge which asserts "that the non-suit taken in the garnishment suit was not a breach of the [garnishment] bond," if not positively erroneous, is misleading and should be refused. *Ib.* 19.
 5. *Same; right to consider what was done in the garnishment trail.* An instruction that "The jury can not consider for any purpose, what happened on the trial of the garnishment suit;" or that "The jury can not consider, for any purpose, the fact that the plaintiff in the garnishment suit took a non-suit," does not assert a correct proposition of law. *Ib.* 19.
 6. *Same; responsibility of principal for acts of agent.*—A principal is not responsible for the malice, vexation or wantonness of an agent in suing out a writ of garnishment, unless the principal authorized, participated in or ratified such act; and such authority, participation or ratification can not be inferred from the mere relation of principal and agent, but must be proved. *Ib.* 19.
 7. *Same; defense as to vexatious suing out of a writ.*—An honest belief, founded upon reasonable grounds, that a writ of garnishment was necessary, may furnish a defense against a recovery for vexatious suing out of the writ; but is no answer to the claim for actual damages sustained by the wrongful suing out of the writ. *Ib.* 19.

GIFTS CAUSA MORTIS.

1. *Gifts causa mortis.*—To constitute a valid gift *causa mortis* the donor must part with possession and all present control over the thing given, must do that which shows conclusively such intention, and the delivery must be as complete as the nature of the property will allow. *Jones v. Weakley*, 441.
2. *Same; savings bank book.*—A delivery by the donor to the donee of a savings bank deposit book, standing in the name of the donor, is a complete and valid gift *causa mortis* of the deposit, if such was the intention of the donor. *Ib.* 441.
3. *Same; pass book of ordinary bank.*—A delivery of a pass book of an ordinary bank is not sufficient to constitute a valid gift *causa mortis* of the money on deposit, since the depositor does not, thereby, lose control over the deposit, and it was not the best available delivery of such deposit. *Ib.* 441.

GUARDIAN AND WARD.

1. *Guardian ad litem for infants; allowance for solicitor's fees.*—When infants are necessary parties to a chancery suit, their interests can only be represented by a guardian *ad litem*, and a person

GUARDIAN AND WARD—CONTINUED.

who has an adverse interest to them, however slight, can not properly act as guardian *ad litem*; and when they are not properly represented by a guardian *ad litem*, an allowance for solicitor's fees, for services rendered them, is improper and erroneous. *Parker v. Parker*, 239.

HABEAS CORPUS.

1. *Misdemeanors triable before justice of the peace; trial or commitment by him.*—When a person is brought before a justice of the peace, charged with a misdemeanor which the justice has jurisdiction to try and determine on its merits, the prosecutor and the witness also being present, it is the duty of the justice to proceed with the trial and render final judgment (Code, § 4239); and he has no power to bind the defendant over to answer an indictment, unless a trial by jury is demanded. *Ex parte Pruitt & Harper*, 225.
2. *Delay in execution of sentence.*—A defendant in a criminal case convicted of a misdemeanor and sentenced to perform hard labor for the county, is entitled to be discharged from custody on *habeas corpus*, if there is unreasonable delay in the execution of the sentence; and in this case, his detention in jail for twenty-two days after sentence, without sufficient excuse or explanation, is held unreasonable delay. *Ex parte Rand*, 302.

HEIRS.

1. *When "heirs of her body" are terms of purchase.*—In a deed of gift from a husband, in which he conveys to his wife "and the heirs of her body by myself as husband," especially excluding in said deed all rights of inheritance or other rights of the heirs of the wife by any other person, and when there were living children of the grantor by his said wife at the time of the conveyance, the terms used must be construed, not as words of limitation and inheritance, but as descriptive of a class of persons to take under the deed as purchasers; and the estate so created in the wife is not an estate tail. *Sullivan v. McLaughlin*, 60.
2. *Parties to bill for settlement of administration.*—Infants are necessary parties to a bill which seeks a settlement of the administration of the estate of an intestate of which they are distributees, or the accounts of a partnership of which he was a member, the surviving partner being his administrator. *Parker v. Parker*, 239.
3. *Partnership property on dissolution by death.*—On the dissolution of a partnership by the death of one of the partners, the title to the personal assets devolves on the survivor, first for the payment of debts, and the residue for distribution among the next of kin; and the title to the real estate vests in the heirs, subject in equity to be converted into partnership assets and used for partnership purposes. *Ib.* 239.
4. *Improvements erected by surviving partner on partnership property.* If the surviving partner erects valuable improvements on real estate which belonged to the partnership, the respective interests of himself and the heirs of the deceased partner in the property may be ascertained and determined in a suit for a settlement of the partnership accounts, without a partition of the property; and he can not charge the heirs with their share of the expenses incurred in making the improvements, in the absence of an express agreement on their part, or such a course of dealing as evidences an implied agreement. *Ib.* 239.

HOMESTEAD.

1. *Homestead exemption to widow.*—The Probate Court has jurisdiction to allot to the widow, as a homestead exemption, the lands of which her husband died seized and possessed, when (and only when) they do not exceed 160 acres in area, nor \$2,000 in value, (Sess. Acts 1884-5, p. 114); and the title of the land so allotted vests absolutely in her, as fully and completely as if the husband's estate had been declared insolvent. *DeArmond v. Whitaker*, 252.
2. *Husband and wife as parties.*—When the legal title to the homestead is in the husband, the wife can not properly be joined with him in a bill which seeks the cancellation of a mortgage of the land on the ground that it was not acknowledged by her on separate examination as by law required. *Grider v. Am. Freehold Land Mortg. Co.*, 281.
3. *Mortgage of homestead; acknowledgment by wife; conclusiveness of officer's certificate.*—When a mortgage, or other alienation of the homestead, is signed by husband and wife, and a certificate of acknowledgment, in due form, is appended by an officer authorized to take it, the certificate is conclusive as to the facts stated, unless impeached by proof of fraud or duress, in which the grantee participated, or of which he had knowledge or notice before he parted with the consideration; but, if there was in fact no appearance before the officer, or no acknowledgment whatever before him, that fact may be shown in avoidance of the certificate, and it renders the instrument void, even if the grantee is a purchaser for value without notice. *Ib.* 281; *Giddens v. Bolling*, 319.
4. *Homestead exemption; abandonment.*—Temporary absence from a homestead for less than 12 months is not an abandonment, so long as there exists in the owner the *animus revertendi*. *Fuller v. Whitlock*, 411.
5. *Same.*—When, after a claim of homestead exemption has been duly made and filed, the owner during a temporary absence leases the premises for a period less than one year, his right to such exemption is not forfeited, provided the *animus revertendi* continued to exist; and a sale of the premises within 12 months from the time of his leaving is a conveyance of the homestead. *Ib.* 411.
6. *Same; sale of, can not be impeached by creditors.*—A sale of property, exempt as a homestead, can not be impeached by creditors, and this, notwithstanding the sale may have been fraudulent, and made to hinder, delay or defraud the creditors. *Ib.* 411.
7. *Res inter alios acta.*—Proceedings in a contest of a homestead exemption between an execution creditor and his debtor, are *res inter alios acta* as to the debtor's grantee, who files a bill to enjoin a sale under the execution. *Ib.* 411.

HUSBAND AND WIFE.

1. *Homestead exemption to widow.*—The Probate Court has jurisdiction to allot to the widow, as a homestead exemption, the lands of which her husband died seized and possessed, when (and only when) they do not exceed 160 acres in area, nor \$2,000 in value, (Sess. Acts 1884-5, p. 114); and the title of the land so allotted vests absolutely in her, as fully and completely as if the husband's estate had been declared insolvent. *DeArmond v. Whitaker*, 252.
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HUSBAND AND WIFE—CONTINUED.

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4. *When action lies to charge wife's statutory estate for necessary family supplies.*—Under the statutory provisions of force in 1884-86, (Code of 1876, §§ 2711-12; Sess. Acts 1880-81, p. 36), an action of law would not lie against the personal representative of the deceased wife, to charge her statutory estate with the price of articles of comfort and support of the household furnished during coverture. *Harmon & Son v. Siler*, 806.
5. *Married woman relieved of the disabilities of coverture has power to contract for payment of attorney's fees.*—A married woman relieved of the disabilities of coverture by a decree of the chancellor, "so far as to invest her with the power to buy, sell, hold, convey and mortgage real and personal property," is competent to bind herself and her property by a stipulation in a mortgage for the payment of attorney's fees, and all other expenses of foreclosing the mortgage. *McCall v. Am. Freehold L'd Mortg. Co.*, 427.
6. *Averments of petition to be relieved of disabilities of coverture; sufficient allegations in bill to foreclose mortgage.*—A petition by a married woman averring that she was the owner of a statutory, separate estate, and praying her disabilities of coverture as to such estate be removed, so far as to invest her with the right to buy, sell, hold, mortgage and convey her said real and personal property, and to sue and be sued as a *feme sole*, alleges the jurisdictional facts necessary to warrant a decree relieving her of the disabilities of coverture; and a bill which avers these facts, and further avers that her husband was made a party defendant to said petition "and, in a writting signed by him and filed in said caused, gave his assent thereto," shows that a decree of the chancellor removing the disabilities of coverture, was based upon a petition which contained the requisite jurisdictional allegations. *Ib.* 427.
7. *Petition of married woman to be relieved of the disabilities of coverture; when sufficient.*—A petition to be relieved of the disabilities of coverture, which avers that the petitioner is a married woman, of lawful age, and the owner of a statutory separate estate, that she has sustained losses by fire, and in order to rebuild it is necessary to mortgage such estate, and which prays "that she be decreed a *feme sole*, for the purposes of, and so far as to invest her with the right of, executing a mortgage on her statutory separate estate, and for such further and other relief as the nature and equity of this case, and the statute for such cases made and provided, will allow," is sufficient to

HUSBAND AND WIFE—CONTINUED.

support a decree relieving her of the disabilities of coverture, in accordance with the statute then existing. (Code of 1876, § 2731.) *Black v. Moseley*, 447.

INDICTMENTS. See CRIMINAL LAW, 39-45.

INSURANCE.

1. *Taration; insurance company not relieved as to its capital stock invested in other corporations.*—An insurance company, which has invested a portion of its capital stock in the capital stock of another corporation, can not be relieved from the payment of taxes assessed against such part of its capital stock, on the ground that such portion is "invested in property which is otherwise taxable," as provided by section 458, subdivision 9, of the Code. *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery Co.*, 1.
2. *Insurance company not authorized to subscribe to the capital stock of another corporation.*—Section 1535, subdivision 7 of the Code, which provides that insurance companies may "invest their money in real or personal property, stock or choses in action," does not authorize insurance companies to subscribe for and invest its capital stock in the capital stock of other corporations. *Ib.* 1.

JUDGMENTS AND DECREES.

1. *Judgment by default against corporation, without writ of inquiry.* In an action against a corporation to recover a statutory penalty, judgment by default may be rendered on proof of service on a person named as agent; and the penalty being necessarily the amount of the recovery, no writ of inquiry is necessary to assess the damages. *Tenn. Mut. Bldg. & Loan Asso. v. State*, 197.
2. *Presumption in favor of judgment.*—When a case is submitted to the decision of the court without a jury, and the bill of exceptions does not purport to set out all the evidence adduced, this court will presume that there was other evidence which justified the decision. *Garner v. Ullman*, 218.
3. *Lien of registered judgments.*—In determining the priority of the lien of judgment duly registered in the office of the probate judge (Sess. Acts 1888-9, p. 80), fractions of a day are to be computed, and the judgment first filed is entitled to priority over one filed on a subsequent hour of the same day. *German Security Bank v. Campbell*, 249.
4. *Equitable relief against judgment at law, on ground of accident or mistake.*—A court of equity will not grant relief against a judgment at law, on the ground that, by accident or mistake, it was rendered for a greater amount than was due, when it appears that the defendant, when served with process, put the papers in his pocket without reading them, did not show them to his attorney, but told the attorney that he was sued for the sum which he admitted to be due, and the attorney thereupon consented to the rendition of the judgment as claimed, not knowing that the amount was greater than his client admitted to be due. *Slappey v. Hodge Bros.*, 300.
5. *When judgment not set aside for want of notice.*—A judgment in a condemnation proceeding in the Circuit Court, on appeal from the Probate Court, will not be set aside for an alleged want of notice to the respondent of the appeal from the Probate Court, when the record shows the respondent appeared in the Circuit Court by her attorney, and defended against the judgment of condemnation. *Newton v. Ala. Mid.Rwy. Co.*, 468.

JUDGMENTS AND DECREES—CONTINUED.

6. *Appearance shown by the record conclusive.*—When it is shown by the record that on an appeal to the Circuit Court the defendant appeared by her attorney and defended, such appearance can not be disputed on motion to set aside the judgment for want of notice of appeal; the record entry in such case being conclusive *Ib.* 468.
7. *Judgment against one of two defendants, when sued for the same tort.* Where, in an action for injuries against two railroad companies, the complaint alleges the joint and several liability of the defendants for the result of their separate and distinct, but concurring and co-acting negligence, and the sufficiency of the complaint is not tested by demurrer, but both the defendants plead the general issue, judgment may be properly rendered against one of the defendants and in favor of the other. *R. & D. R. R. Co. v. Greenwood*, 501.
8. *Judgment against a partnership.*—In a suit where the defendant is described in the caption of the complaint as B., M. & H., "a firm composed of" certain individuals, and there is nothing in the body of the complaint to show that the members of the firm are sued, and the summons to the defendant follows the caption of the complaint, a judgment rendered therein is against the partnership as a firm, as provided by section 2805 of the Code, and is not joint and several in its legal effect, as provided in section 2804 of the Code. *Baldrige v. Eason*, 516.
9. *Same; execution thereon.*—An execution issued upon a judgment recovered against a firm only, as provided in section 2805 of the Code, can be levied only on the property of the firm. *Ib.* 516.
10. *Proof of notice; recitals thereof in judgment-entry.*—To sustain a judgment by default against a non-resident, who was not personally served with notice, the suit being commenced by attachment, the record must show that proof was made to the court of all the facts necessary to constitute constructive notice by publication (Code of 1886, § 2936); and the mere recital in the judgment-entry that notice was given as required by law, not stating the facts, is not sufficient to sustain the judgment on appeal. *Meyer v. Keith*, 519.
11. *Personal judgment by default against non-resident.*—A personal judgment by default can be rendered against a non-resident in attachment, upon proof of statutory notice. *Ib.* 519.
12. *Action of ejectment; judgment therein carries costs.*—In an action of ejectment, where there is a plea of disclaimer, and it is shown by the evidence that the defendant has never claimed title to, or ownership of the lands sued for, but that he was in actual possession of a small part of the land in controversy, his plea of disclaimer was to this extent not sustained, and the court in rendering judgment for the plaintiff should have allowed him his costs. *Buxbaum v. McCorley*, 537.
13. *Action against a corporation; judgment by default; proof of service of process.*—To authorize the rendition of a judgment by default against a corporation, the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service, such an officer or agent of the defendant, as was, by law, authorized to receive service of process for, and on behalf of the defendant. *Oxanna Building Assn. v. Agee*, 571.
14. *Judgment by default, without service of process.*—In an action against several defendants, one of whom is not served with process, it

JUDGMENTS AND DECREES—CONTINUED.

is error to render judgment by default against all of the defendants, and such judgment will be reversed. *Windham v. National Fertilizer Co.*, 578.

15. *Same; effect of such reversal.*—The only effect of such reversal is to strike from the judgment the name of the defendant not served, it being operative as to the others. *Ib.* 578.
16. *Bill in equity against a corporation; proof of service of process.* Before a decree *pro confesso* and final decree can be rendered in a suit in chancery against a corporation, proof must be made that the person upon whom, as shown by the sheriff's return, the process of summons was served, was the agent of the corporation, or occupied such other relation towards it, as justified the service upon him for the corporation. *Oxanna Building Assn. v. Agee*, 591.
17. *Effect of decree on appeal; complainant estopped.*—When in a foreclosure suit the prayer of the bill is that all claims under the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant, the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Bolling & Son v. Pace*, 607.

JURY AND JURORS.

1. *Argument of counsel to jury.*—In argument to the jury in a criminal case, counsel should not be restricted by a narrow or rigid rule, but should be allowed reasonable license in discussing the evidence and inferences to be drawn from it, but should not be allowed to state as fact that of which there is no evidence, and which would not be relevant evidence if offered; and if counsel are allowed to exceed this limit, against the objection and exception of the defendant, in a matter which may prejudice, it is reversible error. *Dollar v. State*, 236.
2. *Same.*—On a prosecution for selling liquor to a minor, it is not permissible for the solicitor to state to the jury, against the objection and exception of the defendant, that their town is worse cursed with the illegal sale of whiskey than any other place known to him, that they are trying to build up a school there, and that parents will not send their children to school in a place where they can get whiskey at every corner; but the defendant's counsel having commented on the fact that solicitor's fee on a conviction for selling liquor to a minor was five times as great as on a conviction for selling without a license, the solicitor may state, in reply, that he would willingly "give up all of his fees in the liquor cases if he could put down the accursed traffic." *Ib.* 236.
3. *Same.*—In an action against a railroad company to recover damages for the killing of a cow, a statement by the plaintiff's counsel in his argument before the jury, that "the witnesses were bound to testify as they did; that if they had testified differently, they would have been promptly discharged," when wholly unsupported by the evidence, is properly excluded. *Moody v. A. G. S. R. R. Co.*, 553.
4. *Struck jury.*—When, in an action against two defendants, each demands a struck jury, under section 2752 of the Code, they are

JURY AND JURORS—CONTINUED.

not entitled to separate panels; but a list containing the names of 24 jurors in attendance upon court must be furnished to the parties defendant. *R. & D. R. R. Co. v. Greenwood*, 501.

5. *Improper charges*.—It is improper to give to the jury charges predicated upon the ignorance and incapacity of jurymen to make a calculation or render a verdict in the particular case. *L. & N. R. R. Co v. Davis*, 598.

JUSTICES OF THE PEACE.

1. *Misdemeanors triable before justice of the peace; trial or commitment by him*.—When a person is brought before a justice of the peace, charged with a misdemeanor which the justice has jurisdiction to try and determine on its merits, the prosecutor and the witness also being present, it is the duty of the justice to proceed with the trial and render final judgment (Code, § 4239); and he has no power to bind the defendant over to answer an indictment, unless a trial by jury is demanded. *Ex parte Pruitt*, 225.

LANDLORD AND TENANT.

1. *Landlord can not maintain trespass against his tenant*.—A landlord, who is not in possession of leased premises, and who is not entitled to the present enjoyment thereof, can not maintain trespass against his tenant to recover the penalty imposed by statute (Code, § 3296), for willfully and knowingly cutting trees without the consent of the owner of the land. *Rogers v. Brooks*, 31.
2. *Contract of rent for one year*.—A contract for the rent of premises for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 1732), unless reduced to writing. *Garner v. Ullman*, 218.
3. *Contract of rent by the month*.—A contract of renting by the month is not presumed to be for the term of one year, but may be terminated by either party at the end of any month. *Ib.* 218.
4. *Breach of the conditions of a lease; waiver of such breach*.—The acceptance by a landlord of the rents accruing after the breach of the conditions contained in a lease, with full knowledge of the breach, and of all the circumstances, is an affirmation that the contract of lease was still in force and was to continue for the time for which the rent was paid and received; and the lessee can not be considered a trespasser during the time for which he paid rent. *Brooks v. Rogers*, 433.
5. *Same*.—The making of a contract by which the lessee released to the lessor a portion of the leased premises for a consideration which was to be credited upon subsequently accruing rent, and which was executed after the knowledge on the part of the lessor that the covenants of the lease were broken, is an affirmation of the subsistence of the lease at the time of such contract, and constitutes a waiver of the forfeiture, and right to re-enter for breach of the covenants of the lease prior to the execution of such contract. *Ib.* 433.
6. *Evidence; proof of other breaches than those specified not admissible*.—Where a lessor has notified his lessee that the contract of lease has been forfeited, by reason of the breach of certain specified covenants therein, he can not, in an action founded upon such forfeiture, introduce evidence of the breach of other and wholly different covenants in the contract of lease. *Ib.* 433.

LANDLORD AND TENANT—CONTINUED.

7. *Possession by tenant; presumed to be continuous.*—When after a contract of tenancy the landlord sees the tenant in possession, cultivating the land, and after an absence of nine years returns and finds the tenant still in possession, it will be presumed that the possession of the tenant under said landlord was continuous during all of that time. *Ala. State Land Co. v. Kyle* 474.
8. *Landlord's lien for rent; superior to subsequent mortgage.*—A landlord's lien for rent of a store-house attaches to property immediately upon its being brought into the rented premises, and is superior to the lien of a mortgage subsequently executed on the same property. *Kyle v. Swem*, 573.

LARCENY. See CRIMINAL LAW, 47-50.

LEVY AND SALE.

1. *Prima facie liability of sheriff for the discharge of a levy.*—The fact that property was levied on under an execution as the property of the defendant, imposes a *prima facie* liability on the sheriff to the plaintiff, for the value of the property, not to exceed the injury plaintiff might sustain from the discharge of the levy; but in the absence of other proof, the statement in the exemption claim, which was offered in evidence by the plaintiff, that the only claim the defendant had to the property levied upon was a lien to secure the debt, overcomes the *prima facie* liability of the sheriff. *Kennedy v. Smith*, 83.
2. *Burden of proof on plaintiff to show that defendant had other property in the county.*—If the defendant in execution has a leviable interest in any other property in the county than that levied upon, the burden is upon plaintiff to prove such fact, and that the sheriff could, with due diligence, have made the money due on the execution by a levy on such property. *Ib.* 83.

LICENSES.

1. *License tax on foreign corporations, under statutory and constitutional provisions.*—The statute approved February 18th, 1893, entitled "An act to require all corporations to pay a fee or license for the use of the State before commencing business in the State" (Sess. Acts 1892-3, p. 690), does not apply to or include a foreign insurance company, which was lawfully engaged in doing business here on that day, having fully complied with all the constitutional and statutory provisions then in force regulating the right of foreign corporations to do business in this State. To make the statute apply to such corporations, would extend its provisions beyond the scope and purview of its title. *The State v. Hartford Fire Ins. Co.*, 221.

LIENS.

1. *Priority of lien by service of process.*—When process in an action by creditors to set aside as fraudulent a sale of a stock of goods is served prior to the levy of defendant's attachment, the attachment lien is subordinate to the lien of the process. *Jefferson Co. Sav. Bank v. McDermott*, 79.
2. *Lien on personal property not subject to levy and sale under execution.*—A mere lien on property, in favor of the defendant in execution, is not subject to levy and sale under such execution, since a lien is not "personal property of the defendant," within the meaning of the statute. (Code, § 2892). *Kennedy v. Smith*, 83.

LIENS—CONTINUED.

3. *Lien of attachments levied on same property.*—When two or more attachments are levied on same property, but on different days, the lien of each dates from its levy, and is subordinate to those levied prior to it; and if all the suits are reduced to judgment they must be paid in the order of their respective levies. *Bamberger, Bloom & Co. v. Vorhees, Miller & Rupel*, 292.
4. *Lien of registered judgments.*—In determining the priority of the lien of judgments duly registered in the office of the probate judge (Sess. Acts 1888-9, p. 60), fractions of a day are to be computed, and the judgment first filed is entitled to priority over one filed on a subsequent hour of the same day. *German Security Bank v. Campbell*, 249.
5. *Lien of a corporation on the shares of the corporation; subordinate to prior pledges.*—When a cashier of a Trust and Savings Company, in the negotiation of a loan and the collection of the proceeds thereof, acquires knowledge and notice of the pledge of shares of its capital stock by a stock-holder, such knowledge or notice is imputable to said company, and it can not, under section 1874 of the Code, assert a lien on the shares of stock so pledged for the security of a debt to it, subsequently contracted by said stock-holder. *B'gham Trust & Sav. Co. v. La. Nat. Bank*, 379.
6. *Breach of trust; participation therein does not create a lien on other property.*—The fact that a partnership firm in contracting a debt with a receiver, who is a member of such firm, participates in a breach of trust by the receiver, does not fasten a lien on the firm's property for the payment of such debt. *Goldthwaite v. Ellison*, 497.
7. *Landlord's lien for rent; superior to subsequent mortgage.*—A landlord's lien for rent of a store-house attaches to property immediately upon its being brought into the rented premises, and is superior to the lien of a mortgage subsequently executed on the same property. *Kyle v. Swem*, 573.
8. *Lien of attachment; not affected by replevy bond.*—The levy of an attachment upon personal property creates a lien and places the property in the custody of the law; and the execution of a replevy bond by defendant in a detinue suit, who is in possession as the bailee of the sheriff, under a writ of attachment previously levied on the property sued for, neither terminates the lien, nor terminates the bailment so as to estop the defendant from denying his possession. *Ib.* 573.

LIEN OF MECHANICS AND MATERIAL MEN. See MECHANIC'S LIEN.

LIEN OF VENDOR. See VENDOR AND PURCHASER.

LIMITATIONS, STATUTE OF.

1. *Possession of land under parol gift; when adverse.*—The possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and if continued without interruption for ten years, is protected by the statute of limitations, and matures into a good title. *Lee v. Thompson*, 95.
2. *Statute of limitations.*—A reservation by the State of an ulterior equitable interest in the proceeds of lands sold by the State does not prevent the statute of limitations from running against the State's grantees from the date of the conveyance, in favor of persons in possession of such lands at the time of the grant. *Ata. State Land Co. v. Kyle*, 474.

LIMITATIONS, STATUTE OF—CONTINUED.

3. *Adverse possession must be continuous.*—Evidence that one claiming title to land leased it for one or two years to another who cut and hauled a quantity of wood from it, and that thereafter there was no other occupancy for five years, when it was again leased to another tenant, who occupied it for five years, does not show that continuous possession for ten years necessary to give title under the statute of limitations. *Ib.* 474.
4. *Action by administrator of deceased employee must be brought within one year after cause of action accrues.*—An action against a railroad company by the administrator of a deceased employee, to recover damages for the alleged negligent killing of his intestate, must be commenced within one year after the cause of action accrued, as provided by subdiv. 6, section 2619 of the Code of 1886; and is not governed by section 2589. *O'Keif, Admr. v. M. & C. R. R. Co.*, 524.

MANDAMUS.

1. *When appeal lies, or mandamus.*—When a suit is properly dismissed at the instance of the plaintiff on the record, the remedy of a person injured thereby is by writ of *mandamus*, and an appeal does not lie. *Jennings v. Pearce*, 303.
2. *Demurrers to a petition for re-hearing and rulings on the pleadings and evidence can not be considered on application for mandamus.* On an application for *mandamus*, to show cause why a superseas granted by a judge of the Circuit Court should not be vacated, and the petition for re-hearing dismissed, this court can not consider the rulings on demurrer to the petition, and on the pleas and evidence in the case. *Ex parte Farquhar & Son*, 375.

MECHANIC'S LIEN.

1. *Statutory lien of contractor as material-man; unused materials.*—The statutory lien given to contractors and material-men, for work done and materials furnished in the erection of a house or other improvements on land (Sess. Acts 1890-91, p. 578), does not extend to the unused materials left on the premises after the completion of the building or improvement. *Lee v. King*, 246.
2. *Statutory lien of mechanics and material-men; what laws are of force.*—The statute approved February 12th, 1891, entitled "An act to provide liens for mechanics and material-men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041 of the Code, and section 3027, as amended by the acts of 1888-89," (Sess. Acts 1890-91, p. 578-80), though capable of execution as a complete system in itself, is to be construed in connection with the unrepealed sections of the former law, making the law now of force to consist of the express provisions of the new statute and the unrepealed sections of the old law as amended or changed by the new. *Colby v. St. James (Colored) M. E. Church*, 259. *B'gham Bldg & Loan Asso. v. May & Thomas Hardware Co.*, 275.
3. *Jurisdiction of equity to enforce statutory lien.*—Since the passage of the act approved Feb. 12th, 1891, as before (Code, § 3048), the statutory lien of a mechanic or material-man may be enforced by bill in equity, when the amount claimed is \$100 or more, without alleging or proving any special ground of equitable jurisdiction. *Colby v. St. James (Colored) M. E. Church*, 259.
4. *Same.*—The jurisdiction of equity to enforce the statutory lien of mechanics and material-men (Code 3048), is not taken away by the later statute approved February 12th, 1891; and a material-man who has obtained a judgment at law

MECHANIC'S LIEN—CONTINUED.

on his claim, and become the purchaser of the property at a sale under it, may come into equity against a prior mortgagee of the property, who has also become the purchaser at a sale under his mortgage, to have the priorities of their respective liens adjusted, and the property sold for their satisfaction. *B'gham B'dg & Loan Asso. v. May & Thomas Hardware Co.*, 275.

5. *Notice before filing claim of lien; constitutional provisions as to laws impairing remedy for enforcement of contracts.*—The provision contained in the act approved February 12, 1891, requiring ten days notice to be given by a person claiming a mechanic's or material-man's lien before filing his claim of lien (Sess. Acts 1890-91, p. 578, § 5), applies to liens claimed under contract made prior to the passage of the statute, the work not having been commenced in this case until after its passage; and this application of the statute does not make it offend the constitutional provision prohibiting laws impairing the obligation of contracts or the remedy for their enforcement. *Osborn v. Johnson Wall Paper Co.*, 309.

MORTGAGES.

1. *Estoppel.*—When the respondent to a bill to set aside a sale under a mortgage claims title to and through a purchaser at the mortgage sale, the mortgage having been executed by the grantor of the complainant, he is estopped from denying that the mortgagor had title to the land, he being the common source of title to both parties. *Sullivan v. McLaughlin*, 80.
2. *When a sale under mortgage premature.*—The recitals in a mortgage that it was given to secure an indebtedness evidenced by "two promissory notes, . . . payable as described in a conveyance of the date" of the execution of the mortgage, and that it was given to secure "the true and prompt payment of the same," by a certain day mentioned in the mortgage, in the absence of the conveyance referred to and of facts showing that one of the notes fell due prior to the date named in the mortgage, will be construed to mean that if the mortgage debt, or any part thereof, remained unpaid after the day named in the mortgage, the mortgagee would have the right to sell under the power; and a sale prior to that date is premature. *Ib.* 80.
3. *Recorded mortgage of personal property not void because mortgagor is left in possession.*—A recorded mortgage of personal property is not void as against non-secured creditors by reason of the mortgagor being left in possession; the recording being regarded as a substitute for the change of possession. *Howell v. Carden*, 100.
4. *Mortgage of personal property; when pronounced void by the court.* A court can not pronounce, as a legal conclusion, that a mortgage of personal property is fraudulent and void as to existing creditors, unless it is shown upon its face, that it was made in trust for the use of the mortgagor, or with the intent to hinder, delay or defraud his creditors. *Ib.* 100.
5. *A recorded mortgage of personal property is not void because the mortgagor is left in possession.*—A recorded mortgage, conveying both realty and personal property is not invalidated as to the personality by reason of the fact that the mortgagor is left in possession of such personal property until default; the recording of a mortgage, as directed by the statute, is regarded as a substitute for a change of possession. *Cooper et al. v. Berney National Bank*, 119.

MORTGAGES—CONTINUED.

6. *Appointment of receiver, notwithstanding sale of property under attachment.*—The fact that non-secured creditors of a mortgagor have attached and sold the personal property mortgaged, does not defeat the paramount lien of the mortgage, so as to prevent the appointment of a receiver, on the application of the mortgagee, to take charge of the property; and this notwithstanding its sale under the attachment. *Ib.* 119.
7. *A creditor cannot claim under a mortgage which he attacks as fraudulent.*—A creditor, who has attacked the validity of a mortgage as having been made to defraud the mortgagor's creditors, can not insist that the mortgage so attacked, together with another previously executed, should be construed together as a general assignment for the benefit of all the mortgagor's creditors; one cannot claim both under and against a mortgage. *Ib.* 119.
8. *Mortgage given to secure a bona fide debt not void.*—Although the effect of a mortgage is to hinder, delay or defraud the mortgagor's creditors, and it was given for that purpose, yet, if the mortgagee did not participate in such intent, but accepted the mortgage for the sole purpose of securing a bona fide debt of the amount named in the instrument, the mortgage is not invalid because of such effect, or because of the fraudulent intent of the grantor. *Ib.* 119.
9. *Mortgage on personal property to be recorded in the county where property is located.*—A mortgage on personal property situated in this State, but executed by a non-resident, should be recorded in the county in which the property is situated. (Code, § 1806.) *Ib.* 119.
10. *Sufficient description of personal property in a mortgage.*—A mortgage on real estate and certain designated personal property, "and other implements," constituting a mining out-fit, "now at the mine known as the P. Mine," contains a sufficient description of the personalty so conveyed, as to render it capable of ascertainment, though such description does not of itself identify all of the personalty. *Ib.* 119.
11. *Husband and wife as parties.*—When the legal title to the homestead is in the husband, the wife can not properly be joined with him in a bill which seeks the cancellation of a mortgage of the land on the ground that it was not acknowledged by her on separate examination as by law required. *Grider v. Amer. Freehold Land Mortgage Co.*, 281.
12. *Mortgage of homestead; acknowledgment by wife; conclusiveness of officer's certificate.*—When a mortgage, or other alienation of the homestead, is signed by husband and wife, and a certificate of acknowledgment, in due form, is appended by an officer authorized to take it, the certificate is conclusive as to the facts stated, unless impeached by proof of fraud or duress, in which the grantee participated, or of which he had knowledge or notice before he parted with the consideration; but, if there was in fact no appearance before the officer, or no acknowledgment whatever before him, that fact may be shown in avoidance of the certificate, and it renders the instrument void, even if the grantee is a purchaser for value without notice. *Ib.* 281; *Giddens v. Bolling*, 319.
13. *Offer to do equity.*—When a mortgage is given for money borrowed, and the mortgagor afterwards seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest. *Ib.* 281; *Ib.* 319.

MORTGAGES—CONTINUED.

14. *Stipulation in mortgage for payment of attorney's fees; sufficient averment of necessity for foreclosure in equity.*—When a bill, filed for the foreclosure of a mortgage, alleges that said mortgage contains no provision authorizing the mortgagee to purchase the mortgaged property if sold under the power of sale, and that by reason of the defenses of usury and the denial of the validity of the mortgage by the mortgagor, no third person would purchase at a sale under the power, a necessity to resort to foreclosure proceedings is sufficiently shown: and attorney's fees should be allowed under a stipulation in said mortgage that the mortgagor would pay such fees "if it shall become necessary to employ an attorney to foreclose this mortgage." *McCall v. Amer. Freehold Ld. Mortg. Co.*, 427.
15. *Mortgage by insolvent partnership; part of its general assignment.*—A partnership that has borrowed trust funds from one of its members, who was the receiver in a chancery cause, without giving a mortgage on real estate as required by order of court, can not, on the day of making a general assignment for the benefit of its creditors, prefer the said receiver, by giving to him a mortgage on a part of the firm's property, although in pursuance of an agreement to give such mortgage, alleged to have been entered into when the loan was made; and a mortgage given under such circumstances will be construed to be part of the general assignment. *Goldthwaite v. Ellison*, 497.
16. *Equity jurisdiction; injunction of sale under the power contained in a mortgage.*—A court of equity will enjoin a sale under the power in a mortgage, when the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose; as where, having refused repeated tenders, he files a bill to foreclose, dismisses it without prejudice when the cause was ready for hearing, and advertises the land for sale under the power in the mortgage, with the avowed purpose of compelling the payment of another claim, which is disputed. *McCulley v. Otey*, 584.
17. *Bill to foreclose mortgage; when defendant not estopped by former litigation.*—A defendant in foreclosure suit, asserting a title paramount under a mortgage, executed prior to the mortgage sought to be foreclosed, is not estopped, by a decree rendered in a former suit, to which he was a party, not involving the validity of his mortgage or the property therein conveyed, in which it was decreed that the mortgage sought to be foreclosed was a valid security in the hands of the complainant. *Bolling & Son v. Pace*, 607.
18. *Same; not affected by right to file cross bill.*—The fact that the defendant in a suit to foreclose a mortgage was a defendant in the former suit and could have propounded his interest as claimed under a prior mortgage only by a cross bill filed in such former suit, praying the foreclosure of said mortgage, does not prevent such defendant from asserting his claim under said mortgage as a defense in the subsequent suit. *Ib.* 607.
19. *Parties to foreclosure suit; when bill should be dismissed.*—In a suit to foreclose a mortgage only those claiming title subordinate to the mortgage should be made parties, and if the answer of a defendant discloses that he relies on a paramount title, the bill should be dismissed as to him, unless the complainant is prepared to prove that such title was, in fact, acquired subsequent to the mortgage. *Ib.* 607.
20. *Same; effect of decree on appeal; complainant estopped.*—When in a foreclosure suit the prayer of the bill is that all claims under

MORTGAGES—CONTINUED.

the mortgage be foreclosed, and it is alleged that one of the defendants asserts an interest in the lands subordinate to the mortgage, and this defendant sets up in his answer a claim and title paramount to that of the complainant, and the same is litigated without objection, and decided in favor of said defendant. the complainant can not, on appeal, attack this decree, on the ground that the question could not properly be litigated in a foreclosure suit. Both parties having appeared, and having actually litigated the issue in such suit, are bound by the decree therein. *Ib.* 607.

21. *Lender of money not chargeable with facts known to the agents of the borrower.*—One who lends money upon a mortgage on lands, regularly executed, is not chargeable with the knowledge of brokers, who negotiated the loans as the agents of the borrower, that the mortgagor's title to the said lands was acquired through a voluntary conveyance from his daughter, a married woman; the brokers not being the agents of the lender, and the lender having no knowledge or notice of the attempted evasion of the law. *Allen v. McCullough*, 612.

MORTGAGEE AND MORTGAGOR.

1. *Equitable estate purchased by mortgage with notice does not give priority over vendor's lien*—The fact that the mortgagees, whose title was itself subordinate to the vendor's lien, because of their knowledge of its existence, acquired the equitable estate of the purchasers at an execution sale, can not give them priority over the vendor's lien. *Overall v. Taylor*, 12.
2. *Notice of vendor's lien to mortgagee; when superior to mortgage.* Where a mortgage is executed to a firm, knowledge by one of them that the mortgagor had failed to pay at least part of the purchase price is sufficient to put the mortgagees on inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase-money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage. *Ib.* 12.
3. *Same; when mortgagee's duty to inquire of vendor.*—An inquiry by the mortgagees from the mortgagor and a denial by him of the existence of any lien on the land is not sufficient to entitle the mortgagees to protection as *bona fide* purchasers, since it was their duty to inquire directly from the vendor; the mortgagor being interested adversely to the vendor's lien. *Ib.* 12.
4. *Purchaser at execution sale subsequent to execution of mortgage acquires only an equity, which is subordinate to vendor's lien.*—A purchaser at an execution sale made subsequent to execution of a mortgage by the judgment debtor, acquires only the equity of redemption left in the mortgagor, and, having no legal title, and his equity being subsequent in point of time to that of the mortgagor's vendor, he is not entitled to protection against the vendor's lien as a *bona fide* purchaser, though he had no knowledge or notice whatever of its existence. *Ib.* 12.
5. *Offer to do equity.*—When a mortgage is given for money borrowed, and the mortgagor afterwards seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest. *Grider v. Amer. Freehold Land Mortgage Co.*, 281; *Giddens v. Bolling*, 319.

MOTION DOCKET.

1. *Motion docket; no part of a record.*—A motion docket is no part of a record proper of the Circuit Court, and proceedings shown by it can only become so by being enrolled as matter of record, or by bill of exceptions. *Lienkauff & Strauss v. Tuskaloosa Sale & Adv. Co.*, 819.

MUNICIPAL CORPORATIONS. See CORPORATIONS, SUB-TITLE.

NEGLIGENCE.

1. *Damages for mental anguish caused by negligent failure to transmit telegram.*—Plaintiff having sent a telegraphic message to his brother's wife in a distant town, inquiring about the condition of his mother, who was very ill, and asking for an immediate answer, and his brother replying to the message; he may recover damages for his mental anguish and distress on account of negligent delay in the transmission of the reply message, which prevented his arrival at his mother's bedside until several hours after her death. *West Un. Tel. Co. v. Cunningham*, 814.
2. *Evidence; irrelevant testimony.*—In an action by a brakeman against a railroad company to recover damages for personal injuries, alleged to have been caused by the negligence of the engineer, in backing his train with too much force, while the plaintiff was uncoupling cars in the discharge of his duties, testimony that there were no brakeman on the train at the time of the accident, and that if there had been other brakemen on the train, and they had applied the brakes, the accident could have been averted, is irrelevant, and its admission is error. *Ala. Gr. So. R. R. Co. v. Richie*, 846.
3. *Duty of engineer after discovering perilous position of plaintiff.*—In an action by a brakeman against a railroad company for personal injuries, alleged to have been caused by the negligence of the engineer, if the evidence shows that both plaintiff and engineer were guilty of negligence, proximately contributing to the accident, there should be a verdict for the defendant, unless it is further shown that the engineer knew, or had reason to believe, that the plaintiff was exposed to the peril from which the injury resulted, and that he failed, after he had such knowledge or reason to believe such fact, to exercise that care and diligence which a man of ordinary prudence would have exercised under like circumstances to have prevented the accident, notwithstanding plaintiff's own want of care. *Ib.* 346.
4. *Averment of negligence in the complaint*—In an action by a conductor against a dummy railroad company, for personal injuries, caused by a train running into an open switch, and throwing him from one of the cars, a count of the complaint, which alleges that the injuries were inflicted because "the switch from the main line into the siding on to which said train ran was negligently allowed to be and remain without a lock or other sufficient means of fastening the same," states a good cause of action. *B'gham Railway & Electric Co. v. Allen*, 359.
5. *Same.*—But the averment in one of the counts of said complaint, that the switch "was negligently allowed to remain open," without other allegations of negligence, is insufficient. *Ib.* 359.
6. *Defect in road-way; not having proper lock or fastening upon switch.* Whether a lock or proper fastening is such a component part of the switch as that the failure to provide it renders a railroad

NEGLIGENCE—CONTINUED.

company liable for injuries resulting therefrom, is determined by utility and the usage and custom of well regulated roads. *Ib.* 359.

7. *Same; knowledge of conductor.*—Where in, an action against a railroad company by a conductor for injuries, alleged to have been caused by reason of defects in the condition of the ways, works or machinery of said road, it is shown that the plaintiff had known of the defect complained of for a year prior to the injury, and remained in the employment during that time, he will be held to have assumed the risk, and to be guilty of such contributory negligence as precludes a recovery. *Ib.* 35'.
8. *Volenti non fit injuria*—The doctrine of *volenti non fit injuria* is not changed by the provisions of section 2590 of the Code of 1886; and an employee, with knowledge of a defect in the ways, works or machinery, who continues in the service of his employer after the lapse of a reasonable time for its remedy, assumes the risk incident to such defect, and can not recover for injuries which he receives in consequence thereof.—(*M. & B. R. R. Co. v. Holborn*, 84 Ala. 133; *H. A. & B. R. R. Co. v. Walters*, 91 Ala. 435, overruled.) *Ib.* 359.
9. *Common carriers; liability for all damages referrible to negligent delay in transportation.*—A common carrier, guilty of negligent delay in the transportation of live stock, is liable for all damages resulting from the effect of such delay upon the physical condition of the stock, or from their viciousness aroused by the unnecessary confinement incident thereto. *R. & D. R. R. Co. v. Trousdale & Sons*, 889.
10. *Charge to the jury; nominal damages.*—In an action for damages caused by negligent delay in transporting freight, a charge to the jury that seeks to limit the plaintiff's recovery to nominal damages, on the theory that by ordinary prudence the injury complained of could have been repaired, is affirmatively bad, if, for aught that is hypothesized in said charge, the plaintiff might have been put to great trouble and expense in repairing the injury to his property caused by defendant's negligence. *Ib.* 389.
11. *Gross carelessness, wantonness or recklessness.*—In an action against a railroad company for damages, on account of personal injuries, where it is shown that the accident was within the corporate limits of a town or city, but not at a public crossing, or under such conditions as that defendant was chargeable with notice, in the absence of proof of actual notice that there were persons on the track at the place where the accident occurred, or a knowledge that injury would result as the probable consequences of any mere neglect of duty, no recovery can be had under a count, which alleges that the injuries were caused by the "gross carelessness, wantonness or recklessness" of the defendant. *Stringer v. Ala. Min. R. R. Co.*, 397.
12. "*Gross*," "*reckless*," as applied to negligence.—The words "*gross*" and "*reckless*," when applied to negligence, *per se* have no legal signification that imposes other than simple negligence and a want of due care. *Ib.* 397.
13. *Negligence; two grades.*—There are, in our jurisprudence, but two recognized grades of negligence: (1.) Simple negligence, or want of that care which a reasonably prudent man would exercise under like circumstances. (2.) Willful or wanton negligence, which means such a reckless or wanton disregard of probable consequences, known to the person guilty of the wrong, or under such circumstances as will impute a knowledge to the wrong-doer, or such a negligent omission of preventive

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- effort, after knowledge of danger, as to be the equivalent of willful and intentional injury *Ib.* 397.
14. *Evidence as to simple negligence.*—Where the evidence is in conflict as to whether the defendant is guilty of simple negligence, it is a question for the jury to determine whether the defendant is guilty of negligence, and then whether the plaintiff is guilty of negligence which proximately contributed to his injury. *Ib.* 397.
 15. *Plea of contributory negligence may be waived.*—In an action to recover for personal injuries, where the transcript shows that only the plea of the general issue was filed, but evidence of contributory negligence was introduced, without objection, it will be presumed that the filing of a special plea of contributory negligence was waived by the plaintiff; and the appellate court will review the proceedings of the trial court as if such defense had been specially pleaded *Andrews v. B'gham Min. R. R. Co.*, 438.
 16. *Evidence of custom and practice; when inadmissible.*—Custom and practice can not justify the doing of an act which is negligent *per se*; and the evidence of such a custom and practice is inadmissible. *Ib.* 438.
 17. *Contributory negligence in uncoupling cars; violation of known rule.*—A brakeman on a railroad, who, in violation of a known rule of the company, and without excuse, attempts to uncouple cars while in motion, and injury results therefrom, is guilty of contributory negligence; and when the evidence shows that had he observed the rules of the company the negligence charged against his co-employees would not have caused the injury complained of, the general affirmative charge should be given for the defendant. *R. & D. R. R. Co. v. Thomason*, 471.
 18. *Judgment against one of two defendants, when sued for the same tort.* Where, in an action for injuries against two railroad companies, the complaint alleges the joint and several liability of the defendants for the result of their separate and distinct, but concurring and co-acting negligence, and the sufficiency of the complaint is not tested by demurrer, but both the defendants plead the general issue, judgment may be properly rendered against one of the defendants and in favor of the other. *R. & D. R. R. Co. v. Greenwood*, 501.
 19. *Punitive damages.*—In an action against two railroad companies for injuries caused by a collision, at a point where the two roads intersect, when there is evidence tending to show that the speed of one of the trains at the time of the accident was 30 or 40 miles per hour, that such train was not brought to a full stop near the crossing, as required by statute, never slackened its speed when it approached such crossing, and that the engines of both trains were in plain view when the rapidly moving engine was 150 feet away from the crossing, it is open to the jury to conclude that there was wantonness, wilfulness and reckless indifference to probable consequences on the part of the engineer on such engine, and the question of punitive damages is properly submitted to the jury. *Ib.* 501.
 20. *Same; actual knowledge of danger not necessary to recover such damages.*—If an engineer, who knows the location of the crossing of his road by another road, and that the physical conformation of the locality prevents his seeing trains on the other road, until too close to prevent a collision, unless he has complied with the statute requiring all trains to stop within 100

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- feet of the crossing, and he neglects to stop as required by statute, runs his train upon the crossing without even slackening its speed of thirty or forty miles per hour, and a collision ensues, he is guilty of such wanton and reckless conduct as imposes upon the railroad the liability for punitive damages, notwithstanding he may have had no actual knowledge of the approach of the train on the other road. *Ib.* 501.
21. *Care and diligence required by railroads for passengers.*—The law requires of all railroad companies, and their employees, engaged in the carriage of passengers, the highest degree of care, diligence and skill known to careful, diligent and skillful persons engaged in such business. *Ib.* 501.
 22. *Duty of trainmen stopping at crossings.*—Trainmen, after stopping for a crossing, in obedience to the statute, must, before proceeding, make every effort, that the highest degree of care, skill and diligence requires, to be sure the way is clear and will remain so long enough for the passage of their train over the intersecting road; and this duty is not performed, when, before proceeding, the engineer is only "reasonably sure the way is clear," or has simply "endeavored, in good faith, to ascertain whether or not the way is clear." *Ib.* 501.
 23. *Trainmen's right to assume a compliance with the statute by the employees of an intersecting road.*—A charge that trainmen on one road, who have complied with the statute in approaching a crossing, may assume that trainmen on the intersecting road will also comply therewith, is not objectionable, as ignoring a duty which might have arisen after the train that complied with the statute had started, when given in connection with the further instruction, that the train that stopped had not the right to proceed over the crossing if the circumstances indicated that the other train would not stop. *Ib.* 501.
 24. *Charge invasive of jury's province erroneous.*—In an action against two intersecting railroads for injuries resulting from a collision of trains at their crossing, the alleged negligence being controverted by each, a charge asked by one of the defendants that assumes the negligence of the other, and submits to the jury only whether such negligence was the proximate cause of the injury, is erroneous, as invading the province of the jury. *Ib.* 501.
 25. *Plea of the general issue; admissions thereunder by a corporation formed by consolidation.*—In an action for personal injuries against a corporation, on the theory that it assumed the liability of a negligent corporation, which consolidated with others to form the defendant, after the injuries were received, and before the institution of the suit, the plea of the general issue admits the defendant's corporate character, but does not admit that the defendant derived its existence from the consolidation of the negligent company with other corporations. *Zealy v. Birmingham Railway & Electric Co.*, 579.
 26. *Action against a corporation; evidence of consolidation.*—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property, &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general

NEGLIGENCE—CONTINUED.

issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to prove that the negligent corporation had been merged into the defendant. *Ib.* 576.

NON-RESIDENTS.

1. *Sale of fertilizer; not affected by the non-residence of seller.*—Before a valid sale of commercial fertilizer can be made in this State, the seller must be licensed, and the fertilizer tagged, as required by the statute (Code, §§ 139-141); and this is true whether the seller is a resident or non-resident, and whether the fertilizer was manufactured in this State or elsewhere. *Merriman & Co. v. Knox*, 93.
2. *Non-residence of purchaser at mortgage sale as affecting tender.* When a bill is filed to redeem lands sold under a mortgage, and the purchaser is absent from the State, a tender to be sufficient must be made by a deposit of the money in court on the filing of the bill. *Beebe v. Buxton*, 117.
3. *Mortgage by non-resident on personal property; to be recorded in county where property is located.*—A mortgage on personal property situated in this State, but executed by a non-resident, should be recorded in the county in which the property is situated. (Code, § 1806) *Cooper v. Berney Nat. Bank*, 119.
4. *Grant of administration on estate of non-resident decedent.*—On the death in New York of a resident citizen of that State intestate, and owning a certificate for shares of stock in an Alabama corporation, the Probate Court of the county in which such corporation is located has jurisdiction to grant letters of administration on his estate (Code, § 2013, subd. 3); although an administrator appointed in New York would have authority to transfer the certificate (§ 1872), and payment of dividends might lawfully be made to him. *Winter v. London*, 283.
5. *Proof of notice; recitals thereof in judgment-entry.*—To sustain a judgment by default against a non-resident who was not personally served with notice, the suit being commenced by attachment, the record must show that proof was made to the court of all the facts necessary to constitute constructive notice by publication (Code of 1886, § 2938); and the mere recital in the judgment-entry that notice was given as required by law, not stating the facts, is not sufficient to sustain the judgment on appeal. *Meyer v. Keith*, 519.
6. *Personal judgment by default against non-resident.*—A personal judgment by default can be rendered against a non-resident in attachment, upon proof of statutory notice *Ib.* 519.

NON-SUIT.

1. *Non-suit; misleading charge.*—The taking of a non-suit is not conclusive of the fact of indebtedness *vel non*; and a charge which asserts "that the non-suit taken in the garnishment suit was not a breach of the [garnishment] bond," if not positively erroneous, is misleading and should be refused. *Ala. State Land Co. v. Reed*, 19.
2. *Same; right to consider what was done in the garnishment trial.*—An instruction that "the jury can not consider for any purpose, what happened on the trial of the garnishment suit;" or that "the jury can not consider, for any purpose, the fact that the

NON-SUIT—CONTINUED.

plaintiff in the garnishment suit took a non-suit," does not assert a correct proposition of law. *Ib.* 19.

- 3 *Error without injury in rulings on evidence.*—On appeal from a judgment of non-suit, this court will not consider the correctness of rulings on evidence to which exceptions were reserved, and on account of which the non-suit was taken, when the record shows that the plaintiff can not recover in any event. *Harmon & Son v. Siler*, 303.

NOTICE,

1. *Notice of vendor's lien to sub-purchaser.*—A sub-purchaser of land, knowing that a part of the purchase-money is unpaid, is put on inquiry as to the existence of the vendor's lien, and is chargeable with notice of it, if still outstanding. *Overall v. Taylor*, 12.
2. *Notice of vendor's lien to mortgagee; when superior to mortgage.*—Where a mortgage is executed to a firm, knowledge by one of them that the mortgagor had failed to pay at least part of the purchase price is sufficient to put the mortgagees on inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase-money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage. *Ib.* 12.
3. *Same; when mortgagee's duty to inquire of vendor.*—An inquiry by the mortgagees from the mortgagor and a denial by him of the existence of any lien on the land is not sufficient to entitle the mortgagees to protection as *bona fide* purchasers, since it was their duty to inquire directly from the vendor; the mortgagor being interested adversely to the vendor's lien. *Ib.* 12.
4. *Equitable estate purchased by mortgagee with notice does not give priority over vendor's lien.*—The fact that the mortgagees, whose title was itself subordinate to the vendor's lien, because of their knowledge of its existence, acquired the equitable estate of the purchasers at an execution sale, cannot give them priority over the vendor's lien. *Ib.* 12.
5. *Notice to one partner of non-payment of purchase-money is notice to each member of the firm.*—Where land is purchased by a partner, having notice of the non-payment of the purchase-money, for the benefit of the firm, each member is chargeable with such notice of the non-payment of the purchase-money and the retention of a vendor's lien; and one of them who subsequently acquires the land as his individual property, can not claim protection against the vendor's lien as a *bona fide* purchaser. *Ib.* 12.
6. *Dissolution of partnership; notice thereof.*—Where a partnership has been dissolved, constructive or implied notice of its dissolution will be sufficient as to all persons who have had no previous dealing with the firm; but as to persons who have had previous dealings with it, its continuance will be presumed until actual notice of the dissolution be given, or such steps have been taken as to warrant the inference that such notice has been received. *Joseph, Gaboury & Co. v. Southwark F. & M. Co.*, 47.
7. *Probate of will; notice to next of kin, and failure to give.*—The failure to give notice to one of the next of kin does not render the probate void, but is a mere irregularity, of which the others can not complain on error. *Reese v. Nolan*, 203.
8. *Cashier of bank; notice to him is notice to the corporation.*—Notice received or knowledge acquired by the cashier of a bank, while engaged in the transaction of business, in accordance with the

NOTICE—CONTINUED.

general usage and practice of banking institutions, and within the general apparent line of his duty and authority as cashier, is notice to and knowledge of the bank. *B'ham Trust & Sav. Co. v. La. Nat. Bank*, 379

9. *Proof of notice; recitals thereof in judgment-entry.*—To sustain a judgment by default against a non-resident, who was not personally served with notice, the suit being commenced by attachment, the record must show that proof was made to the court of all the facts necessary to constitute constructive notice by publication (Code of 1886, § 2936); and the mere recital in the judgment-entry that notice was given as required by law, not stating the facts, is not sufficient to sustain the judgment on appeal. *Meyer v. Keith*, 519.
10. *Personal judgment by default against non-resident.*—A personal judgment by default can be rendered against a non-resident in attachment, upon proof of statutory notice. *Ib.* 519.

OFFICERS.

1. *Officer's liability for false return.*—If an officer's return is impeached, and the attack is sustained, he is liable in damages to the party who may have been injured by such false return. *Jefferson Co. Sav. Bank v. McDermott*, 79.
2. *Sheriff a necessary party.*—On a motion to amend a sheriff's return, so as to show a different date of service from that certified, the sheriff is a necessary party. *Ib.* 79.

OVERRULED CASES.

1. *Harrison v. State*, 37 Ala. 154, defining the offense of disturbing religious worship, limited and explained by *Salter v. State*, 207.
2. *Stein v. McArdle*, 25 Ala. 561, as to signing bills of exceptions, overruled by *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.
3. *M. & B. R. R. Co. v. Holborn*, 84 Ala. 133, as to assuming risk of defects in ways, works, &c., overruled by *B'ham Railway & Electric Co. v. Allen*, 359.
4. *Highland Ave. & Belt R. R. Co. v. Walters*, 91 Ala. 435, as to assuming risks of defects, &c., overruled by *B'ham Railway & Electric Co. v. Allen*, 359.

PARTIAL PAYMENTS.

1. *Partial payments, with interest.*—Where the contract of purchase provides that the purchaser shall pay "fifteen dollars cash, and balance with interest from date in quarterly instalments of 10 dollars each," the quarterly payments so required are ten dollars net, including interest accrued at date of payment, to be continued until the entire purchase-money, with interest, is paid. *Root v. Johnson*, 90.

PARTNERSHIP.

1. *Notice to one partner of non-payment of purchase-money is notice to each member of the firm.*—When land is purchased by a partner, having notice of the non-payment of the purchase-money, for the benefit of the firm, each member is chargeable with such notice of the non-payment of the purchase-money and the retention of the vendor's lien; and one of them who subsequently acquires the land as his individual property, can not claim protection against the vendor's lien as a *bona fide* purchaser. *Overall v. Taylor*, 12.

PARTNERSHIP—CONTINUED.

2. *Dissolution of partnership; notice thereof.*—When a partnership has been dissolved, constructive or implied notice of its dissolution will be sufficient as to all persons who have had no previous dealing with the firm; but as to persons who have had previous dealing with it, its continuance will be presumed until actual notice of the dissolution be given, or such steps have been taken as to warrant the inference that such notice has been received. *Joseph, Gaboury & Co. v. Southwark Foundry & Machine Co.*, 47.
3. *Sale by one partner to another; adequate legal remedy.*—A sale by one partner to another of his interest in a partnership, unless it is otherwise provided by the contract of sale, operates such a change in the position of the seller that he no longer has any claim, based upon the existence of the partnership relation, which would justify an accounting between the two parties; and the compensation agreed to be paid must be enforced at law, equity having no jurisdiction to enforce the agreement. *Brown, Admr. v. Burnum*, 114.
4. *Parties to bill for settlement of administration.*—Infants are necessary parties to a bill which seeks a settlement of the administration of the estate of an intestate of which they are distributees, or the accounts of a partnership of which he was a member, the surviving partner being his administrator. *Parker v. Parker*, 239.
5. *Partnership property on dissolution by death*—On the dissolution of a partnership by the death of one of the partners, the title to the personal assets devolves on the survivor, first for the payment of debts, and the residue for distribution among the next of kin; and the title to the real estate vests in the heirs, subject in equity to be converted into partnership assets and used for partnership purposes. *Ib.* 239.
6. *Improvements erected by surviving partner on partnership property.* If the surviving partner erects valuable improvements on real estate which belonged to the partnership, the respective interests of himself and the heirs of the deceased partner in the property may be ascertained and determined in a suit for a settlement of the partnership accounts, without a partition of the property; and he can not charge the heirs with their share of the expenses incurred in making the improvements, in the absence of an express agreement on their part, or such a course of dealing as evidences an implied agreement. *Ib.* 239.
7. *Breach of trust; participation therein does not create a lien on other property.*—The fact that a partnership firm in contracting a debt with a receiver, who is a member of such firm, participates in a breach of trust by the receiver, does not fasten a lien on the firm's property for the payment of such debt. *Goldthwaite v. Ellison*, 497.
8. *Mortgage by insolvent partnership; part of its general assignment.*—A partnership that has borrowed trust funds from one of its members, who was the receiver in a chancery cause, without giving a mortgage on real estate as required by order of court, can not, on the day of making a general assignment for the benefit of its creditors, prefer the said receiver, by giving to him a mortgage on a part of the firm's property, although in pursuance of an agreement to give such mortgage, alleged to have been entered into when the loan was made; and a mortgage given under such circumstances will be construed to be part of the general assignment. *Ib.* 497.

PARTNERSHIP—CONTINUED.

9. *Judgment against a partnership.*—In a suit where the defendant is described in the caption of the complaint as B., M. & H., "a firm composed of" certain individuals, and there is nothing in the body of the complaint to show that the members of the firm are sued, and the summons to the defendant follows the caption of the complaint, a judgment rendered therein is against the partnership as a firm, as provided by section 2605 of the Code, and is not joint and several in its legal effect, as provided in section 2604 of the Code. *Baldrige v. Eason*, 516.
10. *Same; execution thereon.*—An execution issued upon a judgment recovered against a firm only, as provided in section 2605 of the Code, can be levied only on the property of the firm. *Ib.* 516.
11. *Injunction to prevent levy upon individual property of an execution issued upon a judgment against a partnership.*—A bill filed to enjoin a sheriff from threatened levy upon the individual property of the members of a partnership of an execution issued upon a judgment recovered against the firm only, is without equity; a court of law being invested with full authority to prevent an abuse of its process, and being able to give ample redress. *Ib.* 516.

PLEADING AND PRACTICE.

1. *Demurrer to complaint.*—In an action to recover damages, a demurrer to the complaint, which states a good cause of action, is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damage for the injury alleged. *Highland Ave. & Belt R. R. Co. v. Matthews*, 24.
2. *Necessary averments in complaint to recover penalty.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint which avers that plaintiff is the owner of the land from which the trees were cut, the number and description of the trees, and that they were knowingly and willfully cut by defendant, without plaintiff's consent, contains all the facts required to be alleged by the statute; and will be treated as an action in debt, and not in trespass. *Rogers v. Brooks*, 81.
3. *Note given on sale of commercial fertilizers; failure to comply with statute.*—In an action on a promissory note given for the price of a quantity of commercial fertilizer bought by the defendant, a plea averring that the sale was made in Alabama, and that the tags were not affixed to the bags when delivered, and that the sellers had not taken out a license, as required by law, (Code, §§ 140-141), is a full defense to the action. *Merriman & Co. v. Knox*, 93.
4. *Application for probate; nature of proceeding, and parties to contest.*—An application for the probate of a will is a proceeding *in rem*, and though notice to the next of kin is required (Code, § 1987), they are not parties, unless they appear and contest, or actively engage in the litigation. *Reese v. Nolan*, 203.
5. *Same; parties to appeal, and practice.*—One of the next of kin, who, though notified, did not appear on the contest, can not sue out an appeal from the decree admitting the will to probate, nor join in an appeal sued out by the contestants; but, if he was not notified, he may propound his interest by petition to the court below, and, having then been made a party, may sue out an appeal. *Ib.* 203.
6. *Same; notice to next of kin, and failure to give.*—The failure to give notice to one of the next of kin does not render the probate void, but is a mere irregularity, of which the others can not complain on error. *Ib.* 203.

PLEADING AND PRACTICE—CONTINUED.

7. *Same; reducing testimony of witnesses to writing, and recording it.* The statutory provision which requires that the testimony of the witnesses on the hearing shall be reduced to writing, subscribed by them, and recorded with the will in a book provided for the purpose (Code, § 1982), is directory merely, and a failure to comply strictly with it does not avoid the probate. Where the record shows, as here, that the subscribing witnesses were examined on the trial of the contest, and sets out the substance of their evidence, showing the due execution of the will, and the decree admitting the paper to probate, declaring that it has been duly proved, further orders the will and all the papers on file relating to it to be recorded—this is a substantial compliance with the requirements of the statute. *Ib.* 203.
8. *Presumption in favor of judgment.*—When a case is submitted for the decision of the court without a jury, and the bill of exceptions does not purport to set out all the evidence adduced this court will presume that there was other evidence which justified the decision. *Garner v. Ullman*, 218.
9. *Assignment of cause of action in pending suit.*—The plaintiff in a pending suit having assigned the cause of action, or an interest therein, may afterwards dismiss the suit, unless the assignee offers to indemnify him against the costs which might be incurred by its further prosecution. *Jennings v. Pearce*, 303.
10. *When appeal lies, or mandamus.*—When a suit is properly dismissed at the instance of the plaintiff on the record, the remedy of a person injured thereby is by writ of mandamus, and an appeal does not lie. *Ib.* 303.
11. *Error without injury in rulings on evidence.*—On appeal from a judgment of non-suit, this court will not consider the correctness of rulings on evidence to which exceptions were reserved, and on account of which the non-suit was taken, when the record shows that the plaintiff can not recover in any event. *Harmon & Son v. Siler*, 306.
12. *General demurrers.*—When the complaint contains a substantial cause of action, this court will not consider a general demurrer to it, which is forbidden by the statute, (Code, § 2690.) *West. Un. Tel. Co. v. Cunningham*, 314.
13. *Pleading; amendment.*—While it is the better practice, when a complaint is amended, to set out in full the complaint, or count thereof as amended, the pleader may amend by reference to one count in the complaint, adopting a certain portion of it, by adding certain averments thereto, so as to constitute another and separate count. *B'gham Rwy. & El. Co. v. Allen*, 359.
14. *Same.*—Where a demurrer has been sustained to a complaint consisting of a single count, it is objectionable to amend the complaint, by the addition of several counts, by reference to and adoption of the original count; a demurrer having been sustained, the complaint was annulled. *Ib.* 359.
15. *Averment of negligence in the complaint.*—In an action by a conductor against a dummy railroad company, for personal injuries caused by a train running into an open switch, and throwing him from one of the cars, a count of the complaint, which alleges that the injuries were inflicted because "the switch from the main line into the siding on to which said train ran was negligently allowed to be and remain without a lock or other sufficient means of fastening the same," states a good cause of action. *Ib.* 359.

PLEADING AND PRACTICE—CONTINUED.

16. *Same*.—But the averment in one of the counts of said complaint, that the switch "was negligently allowed to remain open," without other allegations of negligence, is insufficient. *Ib.* 359.
17. *Plea of contributory negligence may be waived*.—In an action to recover for personal injuries, where the transcript shows that only the plea of the general issue was filed, but evidence of contributory negligence was introduced, without objection, it will be presumed that the filing of a special plea of contributory negligence was waived by the plaintiff; and the appellate court will review the proceedings of the trial court as if such defense had been specially pleaded. *Andrews v. B'gham Min. R. R. Co.*, 438.
18. *Petition of married woman to be relieved of the disabilities of coverture; when sufficient*.—A petition to be relieved of the disabilities of coverture, which avers that the petitioner is a married woman, of lawful age, and the owner of a statutory separate estate, that she has sustained losses by fire, and in order to rebuild it is necessary to mortgage such estate, and which prays "that she be decreed a *feme sole* for the purposes of, and so far as to invest her with the right of, executing a mortgage on her statutory separate estate, and for such further and other relief as the nature and equity of this case, and the statute for such cases made and provided, will allow," is sufficient to support a decree relieving her of the disabilities of coverture, in accordance with the statute then existing.—(Code of 1876, § 2781.) *Black v. Moseley*, 447.
19. *Petition for sale of land to pay decedent's debts; sufficient averments*. A petition by an administrator for an order to sell lands belonging to the estate of his intestate, for the payment of his debts (Code, §§ 2104, 2106), which alleges that "there is no personal property belonging to said estate with which to pay the debts of said decedent, and that it is necessary to sell the said lands to pay the debts of said estate," is sufficient to confer jurisdiction on the Probate Court to decree a sale. *Smith v. Brannon*, 445.
20. *When judgment not set aside for want of notice*.—A judgment in a condemnation proceeding in the Circuit Court, on appeal from the Probate Court, will not be set aside for an alleged want of notice to the respondent of the appeal from the Probate Court, when the record shows the respondent appeared in the Circuit Court by her attorney, and defended against the judgment of condemnation. *Newton v. Ala. Mid. Rwy. Co.*, 468.
21. *Appearance shown by the record conclusive*.—When it is shown by the record that on an appeal to the Circuit Court the defendant appeared by her attorney and defended, such appearance can not be disputed on motion to set aside the judgment for want of notice of appeal; the record entry in such case being conclusive. *Ib.* 468.
22. *Amendment of petition*.—On appeal to the Circuit Court from a judgment in the Probate Court in a condemnation proceeding, the petition can be amended so as to include more land than was included in the original petition; and both parties being before the court when such amendment was allowed, the judgment in such cause by the appellate court will not be set aside on account of such amendment. *Ib.* 468.
23. *Sufficiency of complaint*.—On an appeal to the Circuit Court, a complaint averring that the defendant "did sell spirituous, vinous or malt-liquors in quantities less than one quart, within

PLEADING AND PRACTICE—CONTINUED.

- the corporate limits of the town of W., and that the same is a violation of and contrary to an ordinance of said town," setting out said ordinance, is sufficient and not demurable. *Smith v. Town of Warrior*, 481.
24. *Municipal corporation; sufficient allegation of its existence.*—A complaint by a town, alleging that the defendant sold liquors within the corporate limits of said town, sufficiently avers that the plaintiff is a municipal corporation. *Ib.* 481.
 25. *Motion to require plaintiff to submit to physical examination; must be seasonably made.*—A motion to require the plaintiff to submit to a physical examination must be seasonably made; and such motion should not be granted if the result would be an unreasonable postponement of the trial, or if it would necessitate the plaintiff's presence in Alabama, when it appears that he was not reasonably equal to the journey from his home in a distant State. *R. & D. R. R. Co. v. Greenwood*, 501.
 26. *Appeal from Recorder's Court; motion to quash proceedings.*—When a person, who has been arrested, without affidavit or warrant, for the violation of a city ordinance, appears before the Recorder, and without objection pleads not guilty, and is tried and fined, he is presumed to have waived the want of an affidavit or warrant of arrest; and on appeal to the City Court a motion to quash the proceedings in that court, on the ground that the prosecution was commenced without affidavit or warrant, comes too late, and is properly overruled. *Aderhold v. Mayor & City Council of Anniston*, 521.
 27. *Variance between complaint and summons.*—When, in a prosecution for the violation of a city ordinance, the summons to the defendant commanded him to appear before the Recorder and answer the charge of "disorderly conduct and fighting," and the complaint filed in the City Court, on appeal, averred that the defendant "participated in a fight," the variance is immaterial, and a demurrer to the complaint on the ground of such variance is properly overruled. *Ib.* 521.
 28. *Filing of complaint.*—A complaint may be filed in the City Court on appeal any time before the trial. *Ib.* 521.
 29. *Pleadings in an action of ejectment.*—In an action of ejectment the defendant may withdraw his plea of not guilty, and file a demurrer to the complaint. *Burbaum v. McCorley*, 537.
 30. *Same; pleas of not guilty and disclaimer.*—A plea of not guilty and a plea of disclaimer present incompatible defenses, and can not properly be pleaded together as defenses to the same action of ejectment. *Ib.* 537.
 31. *Action of ejectment; judgment therein carries costs.*—In an action of ejectment, where there is a plea of disclaimer, and it is shown by the evidence that the defendant has never claimed title to or ownership of the lands sued for, but that he was in actual possession of a small part of the land in controversy, his plea of disclaimer was to this extent not sustained, and the court in rendering judgment for the plaintiff should have allowed him his costs. *Ib.* 537.
 32. *Demurrer to part of plea.*—A demurrer, which is addressed to only a part of a plea is untenable; and if there are defects in certain portions of the plea, the remedy is by motion to strike out, by objection to evidence, or by instructions to the jury to disregard the defective allegations. *Corpening & Co. v. Worthington & Co.*, 541.
 33. *Duplicity in a plea no ground of demurrer.*—A plea is not demurrable for duplicity. *Ib.* 541.

PLEADING AND PRACTICE—CONTINUED.

34. *Demurrer to plea; when improper.*—When, in an action under a contract, to recover for work and labor done in grading for a railroad, the defendant pleads that it was understood and agreed that the measurements and estimates of the work to be made by the engineer of the railroad company should be conclusive upon the parties, and that all the work done was measured and estimated by the engineer on the first day of each month during the continuance of the contract, at which time the plaintiffs were either present, or could have been if they desired, and that the amount so ascertained was paid to the plaintiffs by the defendant before the institution of the suit, a demurrer to such plea, on the grounds, that it does not show that plaintiffs had any notice or opportunity to be present and to be heard, when the estimates were made, that such estimates were *ex parte*, and, in the absence of plaintiffs, not binding on them, is not maintainable and is improper; the proper way to raise the issue intended by the demurrer being by a replication. *Ib.* 541.
35. *Action for damages; averments of complaint.*—In an action against a railroad company for injuries, alleged to have been suffered by the plaintiff while attempting to board a train, by reason of a handle on one of the cars giving away, it is necessary that the complaint should aver that the plaintiff attempted to board the train at a station provided for passengers, or at a place where it is usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the car, or that he was in some manner accepted as a passenger. *North B'gham. Railway Co. v. Liddicoat*, 545.
36. *Same.*—An averment in the complaint, that "plaintiff was in the act of getting on one of defendant's passenger cars as a passenger, as he had a right to do," is a mere statement of the pleader's conclusion, and no weight can be accorded it in determining the sufficiency of the complaint. *Ib.* 545.
37. *Same; pleadings construed against the pleader.*—The averments in a complaint that the plaintiff attempted to board the train when it was a short distance south of where the defendant's road crosses another railroad, does not, by reason of the statute requiring all trains to stop before crossing the track of an intersecting road within one hundred feet of the crossing, raise the inference that the defendant's train was at rest when the plaintiff attempted to board it, it not being averred that the train was on a north-bound trip, and had approached within one hundred feet of the crossing. *Ib.* 545.
38. *Plea of set-off; allegations of conversion by plaintiff.*—By a plea averring that the plaintiff was indebted to the defendant for the value of corporate stock belonging to the defendant, "which was sold by plaintiff for the use of defendant, and converted to its use, which he offers to set-off against the demand of plaintiff," the defendant ratifies said sale and claims as a set-off the purchase-price of the stock; and is not entitled to recover its actual value. *Terry v. B'gham Nat. Bank*, 586.
39. *Plea of general issue; admissions thereunder by a corporation formed by consolidation.*—In an action for personal injuries against a corporation, on the theory that it assumed the liability of a negligent corporation, which consolidated with others to form the defendant, after the injuries were received, and before the institution of the suit, the plea of the general issue admits the defendant's corporate character, but does not admit that the

PLEADING AND PRACTICE—CONTINUED.

defendant derived its existence from the consolidation of the negligent company with other corporations. *Zealy v. B'gham Railway & Electric Co.*, 579.

40. *Summary execution on replevy bond; bond must be strictly statutory.* A replevy bond, to justify the issuance of a summary execution upon its return as forfeited, must follow strictly the provisions of the statute. *Harrison v. Hamner*, 603.
41. *Same; motion to quash.*—A motion to quash a summary execution issued upon a forfeited replevy bond may be acted on at any time when the court is in session, without regard to the term of the court at which the judgment in the original suit was rendered. *Ib.* 603.
42. *Same; exception to ruling thereon.*—When a motion to quash an execution, based upon several grounds, is overruled, an exception reserved to such ruling need not be several as to each of the grounds. *Ib.* 603.

PLEDGE.

1. *Pledge; unauthorized transfer can not vest title as against real owner.* A factor, to whom cotton has been shipped for sale, having stored the same in a warehouse, and obtained receipts therefor in his own name, can not by an unauthorized transfer of the receipts, make his pledgee's title to the cotton superior to that of the true owner. *Com. Bank v. Hurt*, 130.
2. *Limitation of contract of pledge.*—The clause in a contract of pledge, "which cotton has been advanced upon by us to its full value," limits the operation of the pledge to the factor's actual interest in the cotton, and the transaction is not taken out of the common-law rule, which protects the owner against an authorized pledge by one who holds property as a factor, or agent to sell. *Ib.* 130.
3. *Pledge of warehouse receipt; title acquired.*—Where a warehouse receipt given in the name of a factor, for cotton stored by him, recites the name of the owner, and is afterwards transferred by the factor as collateral security for a note, on which note is indorsed that such "cotton has been advanced upon . . . to its full value" by the factor, the pledgee in receiving the receipt has the equivalent of notice of the true state of the account between the owner and the factor, and becomes the purchaser of only such interest and claim the factor could assert. *Commercial Bank of Selma v. Lee*, 493.
4. *Same; not governed by section 1178 of Code.*—Such interest acquired with such notice, is in no sense the character of the interest section 1178 of the Code intends to secure and protect in an endorsee of a warehouse receipt. *Ib.* 493.

PROMISSORY NOTES.

1. *When a sale under mortgage premature.*—The recitals in a mortgage that it was given to secure an indebtedness evidenced by "two promissory notes, . . . payable as described in a conveyance of the date" of the execution of the mortgage, and that it was given to secure "the true and prompt payment of the same" by a certain day mentioned in the mortgage, in the absence of the conveyance referred to and of facts showing that one of the notes fell due prior to the date named in the mortgage, will be construed to mean that if the mortgage debt, or any part thereof, remained unpaid after the day named in the mortgage, the mortgagee would have the right to sell under the power; and a sale prior to that date is premature. *Sullivan v. McLaughlin*, 60.

PROMISSORY NOTES—CONTINUED.

2. *Note given on sale of commercial fertilizer; failure to comply with statute.*—In an action on a promissory note given for the price of a quantity of commercial fertilizer bought by the defendant, a plea averring that the sale was made in Alabama, and that the tags were not affixed to the bags when delivered, and that the sellers had not taken out a license, as required by law (Code, §§ 140-141), is a full defense to the action. *Merriman & Co. v. Knox*, 93.

See VENDOR AND PURCHASER.

RAILROADS.

1. *Injuries to abutting property by building railroad in street; when action lies.*—When a corporation, authorized by its charter to build a railroad along certain streets, has, in the construction of its railroad, injured property abutting on such streets, without first paying compensation for such injury, an action at law will lie for the redress of such wrong. *H. A. & B. R. R. Co. v. Matthews*, 24.
2. *Same; measure of damages.*—The measure of damages for such an injury caused to abutting property is the difference in the market value of the property before and after the act complained of; and the amount of the damage, so ascertained, can not be diminished by the fact that property along the line of the railroad appreciated in value, or was generally benefitted by its construction. *Ib.* 24.
3. *Liability of railroad company under special contract for transportation of live-stock.*—A railroad company, receiving live-stock for transportation, may by special contract limit its liability for damages to injuries arising from its own or its servants' negligence, but not to injuries resulting from their willful negligence; and if the special contract contains the latter stipulation, is nevertheless bound to exercise reasonable and proper care and foresight to avoid injury. *L. & N. R. R. Co. v. Grant & Richardson*, 325.
4. *Burden of proof as to cause or time of injuries; general charge on evidence.*—When the action is against the railroad company which, receiving the stock from the original company, delivered them at their destination, and counts on injuries resulting from the negligence of the defendant's servants, the *onus* is on the plaintiff to prove that the animals were in good condition when received by it; but, if the evidence is conflicting as to their condition at that time, the defendant is not entitled to the general affirmative charge. *Ib.* 325.
5. *Evidence; irrelevant testimony.*—In an action by a brakeman against a railroad company to recover damages for personal injuries, alleged to have been caused by the negligence of the engineer, in backing his train with too much force, while the plaintiff was uncoupling cars in the discharge of his duties, testimony that there were no brakeman on the train at the time of the accident, and that if there had been other brakemen on the train, and they had applied the brakes, the accident could have been averted, is irrelevant, and its admission is error. *Ala. Gr. So. R. R. Co. v. Richie*, 346.
6. *Duty of engineer after discovering perilous position of plaintiff.*—In an action by a brakeman against a railroad company for personal injuries, alleged to have been caused by the negligence of the engineer, if the evidence shows that both plaintiff and engineer were guilty of negligence, proximately contributing to the accident, there should be a verdict for the defendant,

RAILROADS—CONTINUED.

unless it is further shown that the engineer knew, or had reason to believe, that the plaintiff was exposed to the peril from which the injury resulted, and that he failed, after he had such knowledge or reason to believe such fact, to exercise that care and diligence which a man of ordinary prudence would have exercised under like circumstances to have prevented the accident, notwithstanding plaintiff's own want of care. *Ib.* 346.

7. *Duty of brakeman in uncoupling cars; engineer's right to assume its observance.*—If, in the discharge of his duties, it is necessary for a brakeman to go between the cars to uncouple them it is likewise his duty to keep his person from the point of contact between the dead-woods, and this latter being a duty which is feasible while uncoupling the cars, the engineer has a right to assume that it will be performed, and of consequence that it would not endanger the brakeman to back a train while standing on a grade, so as to give "the slack" needed to uncouple the cars. *Ib.* 346.
8. *Same.*—Where there is evidence that after the cars were uncoupled, and while plaintiff was laying the coupling pin on the drawhead of the car in front, such car overtook the detached cars, and the plaintiff's arm was caught between the drawheads, the request that if the plaintiff was injured by his failure to adopt the safer course, he can not recover, is well refused, if it does not appear that he had time to comprehend the safer way, and to adjust himself accordingly. *Ib.* 346.
9. *Charge as to the duty of plaintiff.*—If, in an action by a brakeman against a railroad company for injuries, alleged to have been received while uncoupling cars, on account of the negligence of the engineer, there is evidence from which the jury might believe that the plaintiff's danger was not obvious to him, it is error to instruct the jury, that "If the jury believe from the evidence that it was impossible for plaintiff to have done this work without getting his arm in between the dead-woods, then the court charges the jury that he should not have done the work at all, and he can not recover in this action, if he attempted to do the work, if it were impossible to do so, and while so engaged was injured." *Ib.* 346.
10. *Charge as to obeying the signals of the conductor.*—A charge that assumes that the engineer can not be negligent in operating his engine, if he does so in prompt and careful compliance with the signals of the conductor, is erroneous, where an act, however performed, would be a negligent one; and it is not for the court to assume the truthfulness of the testimony of the conductor that the signal given on a certain occasion was a proper one. *Ib.* 346.
11. *Averment of negligence in the complaint.*—In an action by a conductor against a dummy railroad company, for personal injuries, caused by a train running into an open switch, and throwing him from one of the cars, a count of the complaint, which alleges that the injuries were inflicted because "the switch from the main line into the siding on to which said train ran was negligently allowed to be and remain without a lock or other sufficient means of fastening the same," states a good cause of action. *B'gham Railway & Electric Co. v. Allen*, 359.
12. *Same.*—But the averment in one of the counts of said complaint, that the switch "was negligently allowed to remain open," without other allegations of negligence, is insufficient. *Ib.* 359.

RAILROADS—CONTINUED.

13. *Defect in road-way; not having proper lock or fastening upon switch.*
Whether a lock or proper fastening is such a component part of the switch as that the failure to provide it renders a railroad company liable for injuries resulting therefrom, is determined by utility and the usage and custom of well regulated roads. *Ib.* 359.
14. *Same; knowledge of conductor.*—Where, in an action against a railroad company by a conductor for injuries, alleged to have been caused by reason of defects in the condition of the ways, works or machinery of said road, it is shown that the plaintiff had known of the defect complained of for a year prior to the injury, and remained in the employment during that time, he will be held to have assumed the risk, and to be guilty of such contributory negligence as precludes a recovery. *Ib.* 359.
15. *Volenti non fit injuria.*—The doctrine of *volenti non fit injuria* is not changed by the provisions of section 2590 of the Code of 1886; and an employee, with knowledge of a defect in the ways, works or machinery, who continues in the service of his employer after the lapse of a reasonable time for its remedy, assumes the risk incident to such defect, and can not recover for injuries which he receives in consequence thereof.—(*M. & B. R. Co. v. Holborn*, 84 Ala. 133; *H. A. & B. R. Co. v. Walters*, 91 Ala. 435, overruled.) *Ib.* 359.
16. *Gross carelessness, wantonness or recklessness.*—In an action against a railroad company for damages, on account of personal injuries, where it is shown that the accident was within the corporate limits of a town or city, but not at a public crossing, or under such conditions as that defendant was chargeable with notice, in the absence of proof of actual notice, that there were persons on the track at the place where the accident occurred, or a knowledge that injury would result as the probable consequences of any mere neglect of duty, no recovery can be had under a count, which alleges that the injuries were caused by the "gross carelessness, wantonness or recklessness" of the defendant. *Stringer v. Ala. Min. R. R. Co.*, 897.
17. *Evidence as to simple negligence.*—Where the evidence is in conflict as to whether the defendant is guilty of simple negligence, it is a question for the jury to determine whether the defendant is guilty of negligence, and then whether the plaintiff is guilty of negligence which proximately contributed to his injury. *Ib.* 897.
18. *Crossing railroad track.*—A person has the right to cross over a railroad track wherever he may have occasion to do so, but before attempting to cross, he must look and listen; and if, after having thus assured himself that the way is clear, while attempting to exercise this right by crossing over the railroad track in a city or town, he is injured by the negligence of the employees of the railroad company, in failing to give the signals of warning required by statute, he is entitled to recover for personal injuries thus sustained. *Ib.* 397.
19. *The plaintiff a trespasser.*—If, in an action against a railroad company for damages for personal injuries, it is shown that at the time of the accident the plaintiff was standing on the track, or walking along the track, he was then a trespasser, and is not entitled to recover, although the defendant may have been guilty of negligence in failing to give warning of approach, or to comply with the rate of speed fixed by law. *Ib.* 397.

RAILROADS—CONTINUED.

20. *Bill of lading; right of bona fide purchaser.*—A bona fide purchaser of a false bill of lading from the person to whom it was issued by a railroad company's agent, may hold the company liable to the extent of advances made by him on such bill of lading, under section 1179 of the Code of 1888. *Jasper Trust Co. v. K. C., M. & B. R. R. Co.*, 418.
21. *Same; estoppel of carrier.*—As between a railroad company issuing a bill of lading, regular on its face, and one who shows himself to be the bona fide transferee or purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in such receipt. *Ib.* 416.
22. *False issue of bill of lading by agent of railroad company; inquiry necessary by endorsee.*—When a railroad company's agent issues a bill of lading to a fictitious firm, for goods never received, and endorses it in the name of said firm, the endorsee is put upon inquiry concerning the endorsing firm; and failing to inform himself as to whether there was such a firm, and not obtaining the endorsement from the firm to whom the bill of lading was issued, he can not recover damages from the railroad company under section 1179 of the Code of 1888. *Ib.* 416.
23. *Contributory negligence in uncoupling cars; violation of known rule.*—A brakeman on a railroad, who, in violation of a known rule of the company, and without excuse, attempts to uncouple cars while in motion, and injury results therefrom, is guilty of contributory negligence; and when the evidence shows that had he observed the rules of the company the negligence charged against his co-employees would not have caused the injury complained of, the general affirmative charge should be given for the defendant. *R. & D. R. R. Co. v. Thomason*, 471.
24. *Liability of defendants as joint tort feorsors.*—In an action against two or more defendants, seeking to hold them liable as joint tort feorsors, responsible jointly and severally for the resulting injury, the wrong complained of must, in fact, be jointly done by the defendants, or if contributed to by each, a joint purpose must be imputable to each of them. *R. & D. R. R. Co. v. Greenwood*, 501.
25. *Judgment against one of two defendants, when sued for the same tort.* Where, in an action for injuries against two railroad companies, the complaint alleges the joint and several liability of the defendants for the result of their separate and distinct, but concurring and co-acting negligence, and the sufficiency of the complaint is not tested by demurrer, but both the defendants plead the general issue, judgment may be properly rendered against one of the defendants and in favor of the other. *Ib.* 501.
26. *Punitive damages.*—In an action against two railroad companies for injuries caused by a collision, at a point where the two roads intersect, when there is evidence tending to show that the speed of one of the trains at the time of the accident was 30 or 40 miles per hour, that such train was not brought to a full stop near the crossing, as required by statute, never slackened its speed when it approached such crossing, and that the engines of both trains were in plain view when the rapidly moving engine was 150 feet away from the crossing, it is open to the jury to conclude that there was wantonness, wilfulness and reckless indifference to probable consequences on the part of the engineer on such engine, and the question of punitive damages is properly submitted to the jury. *Ib.* 501.

RAILROADS—CONTINUED.

27. *Same; actual knowledge of danger not necessary to recover such damages.*—If an engineer, who knows the location of the crossing of his road by another road, and that the physical conformation of the locality prevents his seeing trains on the other road, until too close to prevent a collision, unless he has complied with the statute requiring all trains to stop within 100 feet of the crossing, and he neglects to stop as required by statute, runs his train upon the crossing without even slackening its speed of thirty or forty miles per hour, and a collision ensues, he is guilty of such wanton and reckless conduct as imposes upon the railroad the liability for punitive damages, notwithstanding he may have had no actual knowledge of the approach of the train on the other road. *Ib.* 501.
28. *Care and diligence required by railroads for passengers.*—The law requires of all railroad companies, and their employees, engaged in the carriage of passengers, the highest degree of care, diligence and skill known to careful, diligent and skillful persons engaged in such business. *Ib.* 501.
29. *Duty of trainmen stopping at crossings.*—Trainmen, after stopping for a crossing, in obedience to the statute, must, before proceeding, make every effort, that the highest degree of care, skill and diligence requires, to be sure the way is clear and will remain so long enough for the passage of their train over the intersecting road; and this duty is not performed, when, before proceeding, the engineer is only "reasonably sure the way is clear," or has simply "endeavored, in good faith, to ascertain whether or not the way is clear." *Ib.* 501.
30. *Trainmen's right to assume a compliance with the statute by the employees of an intersecting road.*—A charge that trainmen on one road, who have complied with the statute in approaching a crossing, may assume that trainmen on the intersecting road will also comply therewith, is not objectionable, as ignoring a duty which might have arisen after the train that complied with the statute had started, when given in connection with the further instruction, that the train that stopped had not the right to proceed over the crossing if the circumstances indicated that the other train would not stop. *Ib.* 501.
31. *Charge invasive of jury's province erroneous.*—In an action against two intersecting railroads for injuries resulting from a collision of trains at their crossing, the alleged negligence being controverted by each, a charge asked by one of the defendants that assumes the negligence of the other, and submits to the jury only whether such negligence was the proximate cause of the injury, is erroneous, as invading the province of the jury. *Ib.* 501.
32. *Action by administrator of deceased employee must be brought within one year after the cause of action accrues.*—An action against a railroad company by the administrator of a deceased employee, to recover damages for the alleged negligent killing of his intestate, must be commenced within one year after the cause of action accrued, as provided by subdiv. 6, section 2619 of the Code of 1886; and is not governed by section 2589. *O'Keif, Admr. v. M. & C. R. R. Co.*, 524.
33. *Action for damages; averments of complaint.*—In an action against a railroad company for injuries, alleged to have been suffered by the plaintiff while attempting to board a train by reason of a handle on one of the cars giving way, it is necessary that the complaint should aver that the plaintiff attempted to board the

RAILROADS—CONTINUED.

- train at a station provided for passengers, or at a place where it is usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the car, or that he was, in some manner, accepted as a passenger. *North B'gham Railway Co. v. Liddicoat*, 545.
34. *Same*.—An averment in the complaint, that "plaintiff was in the act of getting on one of defendant's passenger cars as a passenger, as he had the right to do," is a mere statement of the pleader's conclusion, and no weight can be accorded it in determining the sufficiency of the complaint. *Ib.* 545.
35. *Same; pleadings construed against the pleader*.—The averments in a complaint that the plaintiff attempted to board the train when it was a short distance south of where the defendant's road crosses another railroad, does not, by reason of the statute requiring all trains to stop before crossing the track of an intersecting road within one hundred feet of the crossing, raise the inference that the defendant's train was at rest when the plaintiff attempted to board it, it not being averred that the train was on a north-bound trip, and had approached within one hundred feet of the crossing. *Ib.* 545.
36. *General affirmative charge*.—When, in an action against a railroad company to recover damages for the killing of a cow, there is evidence from which the jury could infer that defendant's employees were negligent in not averting the accident, it is error to give the general affirmative charge for the defendant. *Moody v. A. G. S. R. R. Co.*, 553.
37. *Argument of counsel to the jury*.—In an action against a railroad company to recover damages for the killing of a cow, a statement by the plaintiff's counsel in his argument before the jury, that "the witnesses were bound to testify as they did; that if they had testified differently, they would have been promptly discharged," when wholly unsupported by the evidence, is properly excluded. *Ib.* 553.
38. *Plea of the general issue; admissions thereunder by a corporation formed by consolidation*.—In an action for personal injuries against a corporation, on the theory that it assumed the liability of a negligent corporation, which consolidated with others to form the defendant, after the injuries were received, and before the institution of the suit, the plea of the general issue admits the defendant's corporate character, but does not admit that the defendant derived its existence from the consolidation of the negligent company with other corporations. *Zealy v. Birmingham Railway & Electric Co.*, 579.
39. *Action against a corporation; evidence of consolidation*.—In an action against a corporation, alleged to have been formed by the consolidation of a corporation guilty of the negligence complained of with other corporations, a deed executed by the negligent corporation to the defendant, after the institution of the suit, which recites the latter's creation by consolidation at some time prior to the date of the deed, and which conveys all rights, property, &c. of the grantor, and an act of the legislature confirming the consolidation referred to in said deed, when taken together with the admission incident to the plea of the general issue—that defendant existed as a corporation before suit was brought—constitute competent evidence of the alleged consolidation prior to the institution of the suit; and, hence, it is error for the court to give the general affirmative charge for the defendant, on the theory that there was no evidence to

RAILROADS—CONTINUED.

- prove that the negligent corporation had been merged into the defendant. *Ib.* 579.
40. *Calculation of damages; what to be considered* --When, in an action to recover damages for personal injuries, the evidence shows the age of the plaintiff, his expectancy of life according to the mortality tables, the rate of his earnings before the injury, his subsequent disability to labor, his helpless condition, and suffering endured, all of these facts must be considered by the jury in the calculation of the damages to be awarded; and charges which are predicated upon facts disclosed in annuity tables introduced in evidence, to the exclusion of these other facts of the case, are properly refused. *L. & N. R. R. Co. v. Davis*, 593.
 41. *Charges to the jury when there is conflict in the evidence.*—When there is conflict in the evidence, as to whether the car that collided with the car that inflicted the injury upon the plaintiff was put upon the track by means of a "running switch" or "drop switch" it is improper to charge the jury that a "running switch" was not made. *Ib.* 593.
 42. *Custom of well regulated roads no excuse for violation of defendant's rules.*—When the rules of a defendant railroad forbid the making of "running switches," it is no excuse for, and does not relieve the said company from negligence imputed, when injury results from a violation of such rules, that other well regulated roads are in the habit of making running switches. *Ib.* 593.

RECEIVER.

1. *Appointment of receiver, notwithstanding sale of property under attachment.*—The fact that non-secured creditors of a mortgagor have attached and sold the personal property mortgaged, does not defeat the paramount lien of the mortgage, so as to prevent the appointment of a receiver, on the application of the mortgagee, to take charge of the property; and this notwithstanding its sale under the attachment. *Cooper v. Berney Nat. Bank*, 119.
2. *Breach of trust; trustee in invitum.*—When a receiver, duly appointed by a Chancery Court, makes an unauthorized disposition of the trust fund confided to him to a person cognizant of the breach of it, who invests the money, such person becomes a trustee *in invitum* of such fund, and if the money can be traced into specific property a trust will attach to such property. *Goldthwaite v. Ellison*, 497.
3. *Same; participation therein does not create a lien on other property.* The fact that a partnership firm in contracting a debt with a receiver, who is a member of such firm, participates in a breach of trust by the receiver, does not fasten a lien on the firm's property for the payment of such debt. *Ib.* 497.
4. *Mortgage by insolvent partnership; part of its general assignment.*—A partnership that has borrowed trust funds from one of its members, who was the receiver in a chancery cause, without giving a mortgage on real estate as required by order of court, can not, on the day of making a general assignment for the benefit of its creditors, prefer the said receiver, by giving to him a mortgage on a part of the firm's property, although in pursuance of an agreement to give such mortgage, alleged to have been entered into when the loan was made; and a mortgage given under such circumstances will be construed to be part of the general assignment. *Ib.* 497.

RECOGNIZANCE. See BAIL, and WITNESS, 2.

REDEMPTION.

1. *Tender; what necessary when purchaser is a non-resident.*—When a bill is filed to redeem lands sold under a mortgage, and the purchaser is absent from the State, a tender to be sufficient must be made by a deposit of the money in court on the filing of the bill. *Beebe v. Burton*, 117.
2. *Payment of money into court not a prerequisite of a bill to redeem and to enjoin the execution of a power of sale.*—The payment of money into court is not essential to the equity of a bill by the mortgagor to redeem and to enjoin the execution of a power of sale, when the bill alleges a tender, several times repeated, and its refusal, and that the complainants "are now ready and willing to pay, and have been ready and willing to pay ever since" the tender. *McCalley v. Otey*, 584.

REGISTRATION OF CONVEYANCES.

1. *Recorded mortgage of personal property not void because mortgagor is left in possession.*—A recorded mortgage of personal property is not void as against non-secured creditors by reason of the mortgagor being left in possession; the recording being regarded as a substitute for the change of possession. *Howell v. Carden*, 100.
2. *A recorded mortgage of personal property is not void because the mortgagor is left in possession.*—A recorded mortgage, conveying both realty and personal property is not invalidated as to the personalty by reason of the fact that the mortgagor is left in possession of such personal property until default; the recording of a mortgage, as directed by the statute, is regarded as a substitute for a change of possession. *Cooper et al. v. Berney National Bank*, 119.
3. *Mortgage on personal property to be recorded in the county where property is located.*—A mortgage on personal property situated in this State, but executed by a non-resident, should be recorded in the county in which the property is situated. (Code, § 1808.) *Ib.* 119.

REHEARINGS.

1. *A judge can not dismiss petition for re-hearing.*—The jurisdiction to finally hear and determine a petition for re-hearing, being conferred by statute (Code, § 2876) upon the Circuit Court, and not upon the judge, the judge has no authority to dismiss such a petition. *Ex parte Farquhar & Son*, 375.
2. *Suspension of execution necessary pending re-hearing; right of court to grant the same.*—A supersedeas granted on an application for re-hearing having been set aside by the direction of this court, a judge of the Circuit Court, on proper application, should grant another supersedeas, pending the petition for rehearing; suspension of execution of the judgment being necessary. *Ib.* 375.
3. *Demurrers to a petition for re-hearing and rulings on the pleadings and evidence can not be considered on application for mandamus.*—On an application for mandamus, to show cause why a supersedeas granted by a judge of the Circuit Court should not be vacated, and the petition for re-hearing dismissed, this court can not consider the rulings on demurrer to the petition, and on the pleas and evidence in the case. *Ib.* 375.

RENT.

1. *Contract of rent for one year.*—A contract for the rent of premises for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 1732), unless reduced to writing. *Garner v. Ullman*, 218.
2. *Contract of rent by the month.*—A contract of renting by the month is not presumed to be for the term of one year, but may be terminated by either party at the end of any month. *Ib.* 218.
3. *Breach of the conditions of a lease; waiver of such breach.*—The acceptance by a landlord of the rents accruing after the breach of the conditions contained in a lease, with full knowledge of the breach, and of all the circumstances, is an affirmation that the contract of lease was still in force and was to continue, for the time for which the rent was paid and received; and the lessee can not be considered a trespasser during the time for which he paid rent. *Brooks v. Rogers*, 433.
4. *Same.*—The making of a contract by which the lessee released to the lessor a portion of the leased premises for a consideration which was to be credited upon subsequently accruing rent, and which was executed after the knowledge on the part of the lessor that the covenants of the lease were broken, is an affirmation of the subsistence of the lease at the time of such contract, and constitutes a waiver of the forfeiture, and right to re-enter for breach of the covenants of the lease prior to the execution of such contract. *Ib.* 433.
5. *Action on rent note; right to maintain the same.*—A vendor of leased premises, who, under an agreement with his vendee, is to retain possession of the rent notes subsequently maturing, collect them as they mature, credit the vendee with the amount collected, and account to her therefor, has no beneficial interest in such rent notes, and can not maintain an action in his own name founded upon them. *Moses v. Ingram*, 483.

See LANDLORD AND TENANT.

REPLEVY BONDS. See BONDS.

RES INTER ALIOS ACTA.

1. *Res inter alios acta.*—Proceedings in a contest of a homestead exemption between an execution creditor and his debtor, are *res inter alios acta* as to the debtor's grantee, who files a bill to enjoin a sale under the execution. *Fuller v. Whitlock*, 411.

RETAILING SPIRITOUS LIQUORS. See CRIMINAL LAW, SUB-TITLE.

RETURN. See OFFICERS.

SALES.

1. *Sale under decree of Probate Court; estoppel.*—When lands are sold under a decree of the Probate Court, and the purchase-money is received by the administrator, and accounted for in his administration, the sale, in a court of equity, will be treated as valid, and the parties estopped from impeaching it. *Oden v. Dupuy*, 36.
2. *Same.*—One who has received and retains the proceeds of property sold, even though sold without authority, is estopped from claiming the property itself. To receive and retain the proceeds is a ratification of the unauthorized sale. *Ib.* 36.
3. *Sale of decedent's lands; estoppel.* Persons who are parties to the final settlement of an executorship are estopped, so long as

SALES—CONTINUED.

such settlement remains unimpeached by direct attack, from claiming in a court of equity the same lands, from the sale of which they received the benefit, and the proceeds of which were fully accounted for to them on such final settlement. *Creamer v. Holbrook*, 52.

4. *When a sale under mortgage premature.*—The recitals in a mortgage that it was given to secure an indebtedness evidenced by "two promissory notes, . . . payable as described in a conveyance of the date" of the execution of the mortgage, and it was given to secure "the true and prompt payment of the same" by a certain day mentioned in the mortgage, in the absence of the conveyance referred to and of facts showing that one of the notes fell due prior to the date named in the mortgage, will be construed to mean that if the mortgage debt, or any part thereof, remained unpaid after the day named in the mortgage, the mortgagee would have the right to sell under the power; and a sale prior to that date is premature. *Sullivan v. McLaughlin*, 80.
5. *Sale of fertilizer.*—Before a valid sale of commercial fertilizer can be made in this State, the seller must be licensed, and the fertilizer tagged, as required by the statute (Code, §§ 139-141); and this is true whether the seller is a resident or non-resident, and whether the fertilizer was manufactured in this State or elsewhere. *Merriman & Co. v. Knox*, 83.
6. *Effect of a sale of lands under a decree.*—A defendant, claiming title by adverse possession, is concluded from setting up such title, when the lands sued for were sold as a part of her donor's estate, under a decree of the Chancery Court in a cause to which she was a party, and at which sale the land was purchased by the plaintiff. *Lee v. Thompson*, 95.
7. *Sale by one partner to another; adequate legal remedy.*—A sale by one partner to another of his interest in a partnership, unless it is otherwise provided by the contract of sale, operates such a change in the position of the seller that he no longer has any claim, based upon the existence of the partnership relation, which would justify an accounting between the two partners; and the compensation agreed to be paid must be enforced at law, equity having no jurisdiction to enforce the agreement. *Brown, Admr. v. Burnum*, 114.
8. *Sale of homestead.*—When, after a claim of homestead exemption has been duly made and filed, the owner during a temporary absence leases the premises for a period less than one year, his right to such exemption is not forfeited, provided the *animus revertendi* continued to exist; and a sale of the premises within 12 months from the time of his leaving is a conveyance of the homestead. *Fuller v. Whitlock*, 411.
9. *Same; can not be impeached by creditors.*—A sale of property, exempt as a homestead, can not be impeached by creditors and this, notwithstanding the sale may have been fraudulent, and made to hinder, delay or defraud the creditors. *Ib.* 411.

SERVICE OF PROCESS.

1. *Officer's liability for false return.*—If an officer's return is impeached, and the attack is sustained, he is liable in damages to the party who may have been injured by such false return. *Jefferson Co. Sav. Bank v. McDermott*, 79.
2. *Sheriff a necessary party.*—On a motion to amend a sheriff's return, so as to show a different date of service from that certified, the sheriff is a necessary party. *Ib.* 79.

SERVICE OF PROCESS—CONTINUED.

3. *Priority of lien by service of process.*—When process in an action by creditors to set aside as fraudulent a sale of a stock of goods is served prior to the levy of defendant's attachment, the attachment lien is subordinate to the lien of the process. *Ib.* 79.
4. *Action against a corporation; judgment by default; proof of service of process.*—To authorize the rendition of a judgment by default against a corporation, the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service, such an officer or agent of the defendant, as was, by law, authorized to receive service of process for, and on behalf of the defendant. *Oxanna Building Asso. v. Agee*, 571.
5. *Judgment by default, without service of process.*—In an action against several defendants, one of whom is not served with process, it is error to render judgment by default against all of the defendants, and such judgment will be reversed. *Windham v. National Fertilizer Co.*, 578.
6. *Bill in equity against a corporation; proof of service of process.* Before a decree *pro confesso* and final decree can be rendered in a suit in chancery against a corporation, proof must be made that the person upon whom, as shown by the sheriff's return, the process of summons was served, was the agent of the corporation, or occupied such other relation towards it, as justified the service upon him for the corporation. *Oxanna Building Asso. v. Agee*, 591.

SHERIFFS.

1. *Officer's liability for false return.*—If an officer's return is impeached, and the attack is sustained, he is liable in damages to the party who may have been injured by such false return. *Jeff. Co. Sav. Bank v. McDermott*, 79.
2. *Sheriff a necessary party.*—On a motion to amend a sheriff's return, so as to show a different date of service from that certified, the sheriff is a necessary party. *Ib.* 79.
3. *Prima facie liability of sheriff for the discharge of a levy.*—The fact that property was levied on under an execution as the property of the defendant, imposes a *prima facie* liability on the sheriff to the plaintiff, for the value of the property, not to exceed the injury plaintiff might sustain from the discharge of the levy; but in the absence of other proof, the statement in the exemption claim, which was offered in evidence by the plaintiff, that the only claim the defendant had to the property levied upon was a lien to secure the debt, overcomes the *prima facie* liability of the sheriff. *Kennedy v. Smith*, 83.
4. *Burden of proof on sheriff to show property not subject to execution.* In a proceeding against the sheriff for a failure to collect money under an execution, where the sheriff has been indemnified, he assumes, by failing to sell, the burden of showing that the property was not subject to levy and sale under the execution. *Ib.* 83.
5. *Failure of plaintiff to file a contest of exemption; duty of sheriff to discharge the levy.*—When a claim of exemption has been filed with the sheriff to property levied on under execution, and due notice thereof given to the attorney or plaintiff in execution, and the latter fails to file a contest within the time prescribed by law, the right of the sheriff to sell under execution ceases, notwithstanding the indemnity, and it becomes mandatory upon the sheriff, under the terms of the statute (Code, § 2521), to discharge the levy. *Ib.* 83.

SHERIFFS—CONTINUED.

6. *The right of sheriff to disregard a claim of exemption.*—A sheriff has no power to pass on the sufficiency of a claim of exemption, and can disregard no claim, unless interposed by the defendant in an execution on a judgment based on a tort, or other demand against which the statute does not authorize a claim of exemption to be interposed. *Ib.* 83.

STATUTES.

1. *By whom action may be instituted, and in what court.*—The statute imposing a penalty on foreign corporations doing business in this State, without a compliance with constitutional and statutory provisions regulating their right to do business here (Sess. Acts 1886-7, p. 102), provides that an action to recover the penalty shall be brought in the name of the State, "by the solicitor of the circuit in which the offense is committed," but does not specify the court in which it shall be brought; and the City Court of Gadsden having all the powers and jurisdiction of a Circuit Court while its solicitor is "charged with the performance in said court of all the duties imposed by law upon circuit solicitors;" *held*, that an action to recover such penalty may be brought in said court and by its solicitor *Tenn. Mutual B. & L. Asso. v. The State*, 198.
2. *License tax on foreign corporations, under statutory and constitutional provisions.*—The statute approved February 18th, 1893, entitled "An act to require all corporations to pay a fee or license for the use of the State before commencing business in the State" (Sess. Acts 1892-3, p. 690), does not apply to or include a foreign insurance company, which was lawfully engaged in doing business here on that day, having fully complied with all the constitutional and statutory provisions then in force regulating the right of foreign corporations to do business in this State. To make the statute apply to such corporations, would extend its provisions beyond the scope and purview of its title. *The State v. Hartford Fire Ins. Co.*, 221.
3. *Statutory lien of mechanics and material-men; what laws are of force.*—The statute approved February 12th, 1891, entitled "An act to provide liens for mechanics and material-men, and to repeal sections 3018 3022, 3025, 3026, 3028, 3041, of the Code, and section 3027 as amended by the acts of 1888-89," (Sess. Acts 1890-91, pp. 578-80), though capable of execution as a complete system in itself, is to be construed in connection with the unrepealed sections of the former law, making the law now of force to consist of the express provisions of the new statute and the unrepealed sections of the old law as amended or changed by the new. *Colby v. St. James M. E. Church*, 259; *B'gham Bldg. & Loan Asso. v. May & Thomas Hardware Co.*, 276.
4. *Jurisdiction of equity to enforce statutory lien.*—Since the passage of the act approved February 12th, 1891, as before (Code, § 3048), the statutory lien of a mechanic or material-man may be enforced by bill in equity, when the amount claimed is \$100 or more, without alleging or proving any special ground of equitable jurisdiction. *Colby v. St. James M. E. Church*, 259.
5. *Same.*—The jurisdiction of equity to enforce the statutory lien of mechanics and material-men (Code, § 3048), is not taken away by the later statute approved February 12th, 1891; and a material man who has obtained a judgment at law on his claim, and become the purchaser of the property at a sale under it, may come into equity against a prior mortgagee of the property,

STATUTES—CONTINUED.

- who has also become the purchaser at a sale under his mortgage, to have the priorities of their respective liens adjusted, and the property sold for their satisfaction *B'gham Bldg. & Loan Asso. v. May & Thomas Hardware Co.*, 276.
6. *Notice before filing claim of lien; constitutional provisions as to laws impairing remedy for enforcement of contracts.*—The provision contained in the act approved February 12, 1891, requiring ten days notice to be given by a person claiming a mechanic's or material-man's lien before filing his claim of lien (*Sess. Acts 1890-91*, p. 578, § 5), applies to liens claimed under contract made prior to the passage of the statute, the work not having been commenced in this case until after its passage; and this application of the statute does not make it offend the constitutional provision prohibiting laws impairing the obligation of contracts or the remedy for their enforcement *Osborn v. Johnson Wall Paper Co.*, 309.
 7. *Statute creating City Court; signing bills of exceptions.*—A statute creating a City Court, that provides that ten days after the rendition of a final judgment in said court, such judgment shall be "as completely beyond the control of the court, as if the term of the court at which said judgment was rendered, had ended at the end of said ten days," does not limit the signing of the bill of exceptions to the ten days, next after judgment rendered in the City Court. The signing of the bill of exceptions is not a taking of control of the judgment by the court. (*Stein v. McArdle*, 25 Ala. 561, overruled.) *Danforth & Armstrong v. Tenn. & Coosa River R. R. Co.*, 331.

STOCK AND STOCKHOLDERS.

1. *Definition of the capital stock of a corporation.*—The capital stock of a corporation is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and is a trust fund for the benefit and security of the creditors of the corporation. *Com. Fire Ins. Co. v. Bd. Rev. of Montg. Co.*, 1.
2. *Capital stock of one corporation can non be invested in the capital stock of another corporation.*—A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for the capital stock of a new corporation; nor can it do this indirectly through persons acting as its agents. *Ib.* 1.
3. *Insurance company not authorized to subscribe to the capital stock of another corporation.*—Section 1535, subdivision 7 of the Code, which provides that insurance companies may "invest their money in real or personal property, stocks or choses in action," does not authorize insurance companies to subscribe for and invest its capital stock in the capital stock of other corporations. *Ib.* 1.
4. *Taxation; insurance company not relieved as to its capital stock invested in other corporations.*—An insurance company, which has invested a portion of its capital stock in the capital stock of another corporation, can not be relieved from the payment of taxes assessed against such part of its capital stock, on the ground that such portion is "invested in property which is otherwise taxable," as provided by section 453, subdivision 9, of the Code. *Ib.* 1.
5. *The capital stock of a corporation a trust fund in the hands of directors.*—The governing body or directors of a corporation

STOCK AND STOCKHOLDERS—CONTINUED.

- hold the capital stock therein as a trust fund, in order that it may be preserved and administered, primarily, for the benefit of the creditors, and, secondarily, for the benefit of the stockholders. *Corey v. Wadsworth*, 68.
6. *Transfer of stock as collateral security; notice thereof.*—The power to negotiate loans being expressly conferred by charter upon a Trust & Savings Company, if the cashier of such company, in negotiating a loan for a customer and in the course of the collection of the proceeds of such loan, acquires knowledge and receives notice of the pledge of shares of the capital stock of such company as collateral security, such knowledge and notice is imputed to the company. *B'gham Tr. & Sav. Co. v. La. Nat. Bank*, 379.
 7. *Same.*—The knowledge thus imputed to the company is binding upon and controls it in subsequent transactions with such borrower, though conducted by different officers after the former cashier's death, so long as the shares of stock remain in the hands of the transferer. *Ib.* 379.
 8. *Lien of a corporation on the shares of the corporation; subordinate to prior pledge.*—When a cashier of a Trust and Savings Company, in the negotiation of a loan, and the collection of the proceeds thereof, acquires knowledge and notice of the pledge of shares of its capital stock by a stock-holder, such knowledge or notice is imputable to said company, and it can not, under section 1874 of the Code, assert a lien on the shares of stock so pledged for the security of a debt to it, subsequently contracted by said stock-holder. *Ib.* 379.
 9. *Plea of set-off; allegations of conversion by plaintiff.*—By a plea averring that the plaintiff was indebted to the defendant for the value of corporate stock belonging to the defendant, "which was sold by plaintiff for the use of defendant, and converted to its use, which he offers to set-off against the demand of plaintiff," the defendant ratifies said sale and claims as a set-off the purchase-price of the stock; and is not entitled to recover its actual value. *Terry v. B'gham Nat. Bank*, 566.
 10. *Stock sold on exchange; agent for seller and buyer.*—The fact that a member of the Stock Exchange, who was employed by the pledgee of stock to sell it on the Exchange, was also employed by a buyer to purchase, at a limited price, stock of the character offered by the pledgee, does not invalidate the sale effected by such member, if, in accordance with the rules of the Exchange, he procured a fellow member to make the bid, and neither the pledgee nor the purchaser had any knowledge of each other's intentions, or of their instructions to their agent. *Ib.* 566.

STOCK EXCHANGE.

1. *Stock sold on exchange; agent for seller and buyer.*—The fact that a member of the Stock Exchange, who was employed by the pledgee of stock to sell it on the Exchange, was also employed by a buyer to purchase, at a limited price, stock of the character offered by the pledgee, does not invalidate the sale effected by such member, if, in accordance with the rules of the Exchange, he procured a fellow member to make the bid, and neither the pledgee nor the purchaser had any knowledge of each other's intentions, or of their instructions to their agent. *Terry v. B'gham Nat. Bank*, 566.

SUMMARY PROCEEDINGS.

1. *Replevy bond; penalty enforced by summary execution.*—Although the penalty of a forfeited replevy bond is less than the value of the property, as assessed by the jury, it can be enforced by summary execution against the sureties for the amount of such penalty. *Rich v. Lowenthal*, 487.
2. *Summary execution on replevy bond; bond must be strictly statutory.* A replevy bond, to justify the issuance of a summary execution upon its return as forfeited, must follow strictly the provisions of the statute. *Harrison v. Hamner*, 608.
3. *Same; motion to quash.*—A motion to quash a summary execution issued upon a forfeited replevy bond may be acted on at any time when the court is in session, without regard to the term of the court at which the judgment in the original suit was rendered. *Ib.* 608.
4. *Same; exception to ruling thereon.*—When a motion to quash an execution, based upon several grounds, is overruled, an exception reserved to such ruling need not be several as to each of the grounds. *Ib.* 608.

TAXATION.

1. *Taxation; insurance company not relieved as to its capital stock invested in other corporations.*—An insurance company, which has invested a portion of its capital stock in the capital stock of another corporation, can not be relieved from the payment of taxes assessed against such part of its capital stock, on the ground that such portion is "invested in property which is otherwise taxable," as provided by section 453 subdivision 9, of the Code. *Com. Fire Ins. Co. v. Bd. Rev. of Montg. Co.*, 1.
2. *Taxation of personal property; determination of its situs.*—In determining the liability of personal property to taxation, its actual situs, and not the domicile of the owner, is the material inquiry; and if personal property is brought into this State for the purposes of carrying on certain work, and its business here is not merely transitory, but for an indefinite period, it becomes incorporated with the property in this State for revenue purposes, and is taxable here, notwithstanding the domicile of its owner is in another State. *Nat. Dredging Co. v. State*, 462.
3. *Same; floating property not exempt from taxation.*—The fact that property is floating, and may be moved from place to place by water, does not exempt it from taxation when it is otherwise taxable. *Ib.* 462.
4. *Same; when tug-boat registered elsewhere taxable.*—A tug-boat, although sea-going, propelled by steam and registered at the port of its owner's domicile in another State, is taxable in this State, when its business is wholly in Alabama, and it is to remain here for an indefinite time. *Ib.* 462.

TELEGRAPH COMPANY.

1. *Damages for mental anguish caused by negligent failure to transmit telegram.*—Plaintiff having sent a telegraphic message to his brother's wife in a distant town, inquiring about the condition of his mother, who was very ill, and asking for an immediate answer, and his brother replying to the message; he may recover damages for his mental anguish and distress on account of negligent delay in the transmission of the reply message, which prevented his arrival at his mother's bedside until several hours after her death. *West Un. Tel. Co. v. Cunningham*, 814.

TELEGRAPH COMPANY—CONTINUED.

2. *Waiver of cash payment for telegram; limitation of agent's authority.*—If the agent of the telegraph company, receiving the reply message for transmission at night, promised to wait until the next morning for payment of the charge, the company can not defend an action for damages on account of delay in its transmission, on the ground that the agent had no authority to make such promise, unless it is shown that the person sending the message had notice of his want of authority. *Ib.* 314.
3. *Punitive damages.*—If the agent of the telegraph company, receiving the reply message for transmission, knew the urgent necessity for promptness in forwarding it, but delayed to send it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinces an utter disregard of the feelings and rights of the plaintiff; and if they so determine, they may award punitive damages. *Ib.* 314.
4. *Damages not excessive.*—The award of \$500 as damages by the jury can not be considered excessive, when the plaintiff was prevented by the delay from reaching his mother's bedside until after her death, and the evidence shows such gross negligence as would have authorized the jury to give punitive damages. *Ib.* 314.

TENDER.

1. *When actual tender unnecessary.*—When, before tender made, the party to whom money is due declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money if tendered, actual tender is dispensed with. *Root v. Johnson*, 90.
2. *Same.*—In such case, tender in bill for the specific performance of a contract of sale is sufficient. *Ib.* 90.
3. *Tender; what necessary when purchaser is a non-resident.*—When a bill is filed to redeem lands sold under a mortgage, and the purchaser is absent from the State, a tender to be sufficient must be made by a deposit of the money in court on the filing of the bill. *Beebe v. Burton*, 117.
4. *Tender; effect of.*—A tender of the entire amount due, including interest, at any time between the maturity of the debt and the commencement of suit, stops the interest, and discharges the debtor from the costs of a subsequent suit. *McCalley v. Otey*, 584.
5. *Same; when actual proffer of money is dispensed with.*—The actual proffer of money tendered is dispensed with, when the debtor, ready and willing to pay, is about to produce it, but is prevented by the creditor declaring he will not receive it. *Ib.* 584.
6. *Same; when sufficient to stop payment of interest.*—To avoid the payment of interest after tender, the debtor must tender the exact amount due, and he must keep that amount ready at all times to be paid to the creditor upon his demand, if he should conclude to receive it. *Ib.* 584.
7. *Same; burden of proof.*—When the tender is denied, the burden of proving that the amount tendered was kept at all times in readiness to be paid upon the demand of the creditor, is upon him who pleads the tender. (*Stone, C. J., dissenting.*) *Ib.* 584.

TRESPASS.

1. *Action of trespass; what necessary to maintain it.*—The gist of an action of trespass is the injury done to the possession; and to

TRESPASS—CONTINUED.

support it, the plaintiff must show that, as to the defendant, he had, at the time of the injury, the rightful possession, actual or constructive. If the owner has parted with possession, conferring on another the exclusive right of present enjoyment, retaining in himself only a right to enter into possession at some future time, he can not maintain trespass for an injury to property while the particular right of possession is continuing. *Rogers v. Brooks*, 31.

2. *Landlord can not maintain trespass against his tenant.*—A landlord, who is not in possession of leased premises, and who is not entitled to the present enjoyment thereof, can not maintain trespass against his tenant to recover the penalty imposed by statute (Code, § 3296), for willfully and knowingly cutting trees without the consent of the owner of the land. *Ib.* 31.
3. *Debt proper form of action to recover penalty imposed by section 3296.*—Since the statute, (Code, § 3296), creates a new right in the owner of land, but fails to prescribe any remedy for its enforcement, an action of debt is the proper remedy for a recovery of the penalty imposed, on the ground of an implied promise, which the law annexes for its payment. *Ib.* 31.
4. *Necessary averment by complaint to recover penalty.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint which avers that plaintiff is the owner of the land from which the trees were cut, the number and description of the trees, and that they were knowingly and willfully cut by defendant, without plaintiff's consent, contains all the facts required to be alleged by the statute; and will be treated as an action in debt, and not in trespass. *Ib.* 31.
5. *The plaintiff a trespasser.*—If, in an action against a railroad company for damages for personal injuries, it is shown that at the time of the accident the plaintiff was standing on the track, or walking along the track, he was then a trespasser, and is not entitled to recover, although the defendant may have been guilty of negligence in failing to give warning of approach, or to comply with the rate of speed fixed by law. *Stringer v. Ala. Min. R. R. Co.*, 397.
6. *Breach of the conditions of a lease; waiver of such breach.*—The acceptance by a landlord of the rents accruing after the breach of the conditions contained in a lease, with full knowledge of the breach, and of all the circumstances, is an affirmation that the contract of lease was still in force and was to continue, for the time for which the rent was paid and received; and the lessee can not be considered a trespasser during the time for which he paid rent. *Brooks v. Rogers*, 433.

TRUSTS AND TRUSTEES.

1. *Devise to executor in trust for special purposes, creates a personal trust; enforced by a court of equity.*—A devise to executors "hereinafter named, in trust for uses and purposes," with special directions as to the management of the testator's property and for its ultimate distribution among the devisees under the will, creates in the executor a personal trust, as distinct from executorial duties; and for the enforcement of such a trust resort must be had to a court of equity, a Probate Court having no jurisdiction over it. *Creamer v. Holbrook*, 52.
2. *Testamentary trusts; jurisdiction of Probate Court.*—A Probate Court has no jurisdiction to enforce and settle a trust created by will; but if the trust is not such that its execution is involved in the

TRUSTS AND TRUSTEES—CONTINUED.

discharge of the duties of an ordinary executor, so that the functions of the one person, as executor and as trustee, are not so blended that they can not be distinguished or separated from each other, the Probate Court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as the trustee under the will. *Ib.* 52.

3. *Same*.—When one person is appointed executor, and is also made the trustee under the will with powers unconnected with his ordinary duties as executor, the Probate Court can exercise the same control over him as an executor merely, as it could if he alone had been made the executor, and the special trust had been conferred upon some other person. *Ib.* 52.
4. *Same; jurisdiction of Chancery Court*.—If a special trust or power is attached to the executorial office, and is not personal to him who is named as executor and trustee, then the Probate Court has no jurisdiction to execute the will, as the administration of the estate under the will involves the execution of a trust, which can only be enforced in a court of equity. *Ib.* 52.
5. *The capital stock of a corporation a trust fund in the hands of directors*.—The governing body or directors of a corporation hold the capital stock therein as a trust fund, in order that it may be preserved and administered, primarily, for the benefit of creditors, and secondarily, for the benefit of the stockholders. *Corey v. Wadsworth*, 88.
6. *Same*.—The directors or officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to the interests of its creditors; and if they are themselves creditors, while the insolvent corporation is under their management, they can not secure to themselves any preferment or advantage over other creditors. *Ib.* 68.
7. *Deed of trust; recitals of consideration not evidence against attacking creditor*.—The validity of a deed of trust being assailed by a creditor, whose debt was in existence at the time of its execution, its recitals of consideration are not evidence against him. *Howell v. Carden*, 100.
8. *Same; burden of proof*.—In a statutory claim suit, where the claimant claims under a deed of trust, the validity of which is assailed by a creditor, whose debt was in existence at the time of its execution, the burden is on the claimant to prove the existence of the alleged debt, and the statements in the note and deed of trust are not available for this purpose. *Ib.* 100.
9. *Same; admissibility of deed as evidence*.—This rule does not justify the entire exclusion of the deed of trust and the note secured by it from evidence in a claim suit founded upon them. The recitals of a consideration are admissible to prove the fact of the existence of these instruments, so as to show that, as between the grantor and claimant (trustee), there had been an effectual transfer of title to the property claimed; and the instruments themselves are admissible, in connection with other evidence afterwards adduced, as tending to show valuable and sufficient consideration, which was necessary in order to support a claim as against an attacking creditor. *Ib.* 100.
10. *Deed of trust attacked as fraudulent; burden of proof*.—When a creditor, attacking a deed of trust, given to secure a debt of the grantor, as fraudulent against the grantor's creditors, proves the existence of his debt at the time the deed was executed, the *onus* is cast upon the grantee to prove that the debt which

TRUSTS AND TRUSTEES—CONTINUED.

- the deed purports to secure was justly due at the time of its execution; but if the attacking creditor goes further and seeks to show that the deed was made with the intent to hinder, delay or defraud the grantor's creditors, the burden of proving this intent is upon such attacking creditor. *Ib.* 100.
11. *Deed of trust not invalidated by provision allowing grantor to retain possession of property.*—A provision in a deed of trust, allowing the grantor to retain possession of the property conveyed is not such a reservation of benefit to him as invalidates the instrument against his existing or subsequent creditors, if the debt which the instrument purports to secure was justly due, and the grantee was not a party to any intent to use the instrument to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 12. *Deed of trust given to secure bona fide debt not void, although hindering, delaying or defrauding the grantor's creditors.*—Although the effect of a deed of trust is to hinder, delay or defraud the grantor's creditors, and he executed the instrument with that purpose, yet, if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a bona fide debt to the amount named in the instrument, the deed of trust is not void, either because of its effect upon the rights of other creditors, or because of the fraudulent purpose of the grantor. *Ib.* 100.
 13. *Validity of deed of trust; proper inquiries; what can be shown.* On inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; that the deed covered substantially all of grantor's property, and greatly more than enough to secure grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt; that the grantor was allowed to retain and use the property, and that the property so retained and used was either perishable, or of such a character as to be profitable in its use. A deed of trust can not be pronounced invalid unless the jury find, from the evidence, that it was made either in trust for the use of the grantor, or with the intent, participated in by the grantee, to hinder, delay or defraud the grantor's creditors. *Ib.* 100.
 14. *Breach of trust; trustee in invitum.*—When a receiver, duly appointed by a Chancery Court, makes an unauthorized disposition of the trust fund confided to him to a person cognizant of the breach of it, who invests the money, such person becomes a trustee in invitum of such fund, and if the money can be traced into specific property a trust will attach to such property. *Goldthwaite v. Ellison.* 497.
 15. *Same; participation therein does not create a lien on other property.* The fact that a partnership firm in contracting a debt with a receiver, who is a member of such firm, participates in a breach of trust by the receiver, does not fasten a lien on the firm's property for the payment of such debt. *Ib.* 497.

VARIANCE.

1. *Variance in description of land.*—Where the land sued for is described in the complaint, and also in the judgment-entry, by fractional subdivisions of a section aggregating 180 acres, the verdict being for the land sued for, while the plaintiff's docu-

VARIANCE—CONTINUED.

mentary evidence conveys fractional subdivisions aggregating only 180 or 140 acres, the plaintiff is not entitled to the general charge on the evidence, and the judgment in his favor is erroneous. *DeArmond v. Whitaker*, 252.

2. *Variance; relief can not be granted without allegations.*—Relief can not be granted for matters not alleged, although the evidence may disclose a right to recover; and hence, if, in a suit in equity to foreclose a mortgage, the individual members of a partnership are made parties defendant, but not in their partnership names, and the bill, neither in its averments nor prayer, seeks to enforce the collection of an indebtedness from said firm, a decree against the firm is erroneous, and a bill to review and annul said decree is maintainable. *Cook v. Bolling & Son*, 455.
3. *Variance between complaint and summons.*—When, in a prosecution for the violation of a city ordinance, the summons to the defendant commanded him to appear before the Recorder and answer the charge of "disorderly conduct and fighting," and the complaint filed in the City Court, on appeal, averred that the defendant "participated in a fight," the variance is immaterial, and a demurrer to the complaint on the ground of such variance is properly overruled. *Aderhold v. Mayor and City Council of Anniston*, 521.

VENDOR AND PURCHASER.

1. *Notice of vendor's lien to sub-purchaser.*—A sub-purchaser of land, knowing that a part of the purchase-money is unpaid, is put on inquiry as to the existence of the vendor's lien, and is chargeable with notice of it, if still outstanding. *Overall v. Taylor*, 12.
2. *Notice of vendor's lien to mortgagee; when superior to mortgage.* Where a mortgage is executed to a firm, knowledge by one of them that the mortgagor had failed to pay at least part of the purchase price is sufficient to put the mortgagees on inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase-money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage. *Ib.* 12.
3. *Same; when mortgagee's duty to inquire of vendor.*—An inquiry by the mortgagees from the mortgagor and a denial by him of the existence of any lien on the land is not sufficient to entitle the mortgagees to protection as *bona fide* purchasers, since it was their duty to inquire directly from the vendor; the mortgagor being interested adversely to the vendor's lien. *Ib.* 12.
4. *Purchaser at execution sale subsequent to execution of mortgage acquires only an equity, which is subordinate to vendor's lien.*—A purchaser at an execution sale, made subsequent to execution of a mortgage by the judgment debtor, acquires only the equity of redemption left in the mortgagor, and, having no legal title, and his equity being subsequent in point of time to that of the mortgagor's vendor, he is not entitled to protection against the vendor's lien as a *bona fide* purchaser, though he had no knowledge or notice whatever of its existence. *Ib.* 12.
5. *Equitable estate purchased by mortgagee with notice does not give priority over vendor's lien.*—The fact that the mortgagees, whose title was itself subordinate to the vendor's lien, because of their knowledge of its existence, acquired the equitable estate of the purchasers at an execution sale, cannot give them priority over the vendor's lien. *Ib.* 12.

VENDOR AND PURCHASER—CONTINUED.

6. *Notice to one partner of non-payment of purchase-money is notice to each member of the firm.*—When land is purchased by a partner, having notice of the non-payment of the purchase-money, for the benefit of the firm, each member is chargeable with such notice of the non-payment of the purchase-money and the retention of the vendor's lien; and one of them who subsequently acquires the land as his individual property, can not claim protection against the vendor's lien as a *bona fide* purchaser. *Ib.* 12.
7. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void as against the adverse possessor and the persons in privity with him, and will not support ejectment by the grantee against such adverse holder. But as to all others, and as between the parties themselves, it is valid and operative. *Pearson v. King*, 125.
8. *Right of grantee to use grantor's name in an action of ejectment.*—A conveyance of land adversely held authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property; and the grantor can not prevent such use of his name by the grantee. *Ib.* 125.
9. *Same.*—The grantor in a conveyance of land held adversely can not, by a subsequent release or conveyance to the adverse holder, or by an order to dismiss, defeat an action of ejectment brought in his name for the recovery of the land from the adverse holder, for the benefit of the first grantee. *Ib.* 125.
10. *Bill of lading; right of bona fide purchaser.*—A *bona fide* purchaser of a false bill of lading from the person to whom it was issued by a railroad company's agent, may hold the company liable to the extent of advances made by him on such bill of lading, under section 1179 of the Code of 1886. *Jasper Trust Co. v. K. C., M. & B. R. R. Co.*, 416.
11. *Action on rent note; right to maintain the same.*—A vendor of leased premises, who, under an agreement with his vendee, is to retain possession of the rent notes subsequently maturing, collect them as they mature, credit the vendee with the amount collected, and account to her therefor, has no beneficial interest in such rent notes, and can not maintain an action in his own name founded upon them. *Moses v. Ingram*, 483.
12. *Pledge of warehouse receipt; title acquired.*—Where a warehouse receipt given in the name of a factor, for cotton stored by him, recites the name of the owner, and is afterwards transferred by the factor as collateral security for a note, on which note is indorsed that such "cotton has been advanced upon . . . to its full value" by the factor, the pledgee in receiving the receipt has the equivalent of notice of the true state of the account between the owner and the factor, and becomes the purchaser of only such interest and claim the factor could assert. *Commercial Bank of Selma v. Lee*, 493.
13. *Vendor's lien; waiver by recital in note for purchase-money.*—Although a purchaser's note, with surety, recites that it was given for the purchase-money of land, the vendor's lien is waived if this recital is made as a mere inducement to an agreement, also contained in said note, that the purchaser should have the right to pay off any lien which might exist on the land, and hold the amount so paid as a set-off against said note. *Hammett v. Stricklin*, 616.

VOLENTI NON FIT INJURIA.

1. *Volenti non fit injuria*.—The doctrine of *volenti non fit injuria* is not changed by the provisions of section 2580 of the Code of 1886; and an employee, with knowledge of a defect in the ways, works or machinery, who continues in the service of his employer after the lapse of a reasonable time for its remedy, assumes the risk incident to such defect, and can not recover for injuries which he receives in consequence thereof.—(*M. & B. R. R. Co. v. Holborn*, 84 Ala. 133; *H. A. & B. R. R. Co. v. Walters*, 91 Ala. 435, overruled.) *B'ham Rwy. & Electric Co. v. Allen*, 359.
2. *Same; knowledge of conductor*.—Where, in an action against a railroad company by a conductor for injuries, alleged to have been caused by reason of defects in the condition of the ways, works or machinery of said road, it is shown that the plaintiff had known of the defect complained of for a year prior to the injury, and remained in the employment during that time, he will be held to have assumed the risk, and to be guilty of such contributory negligence as precludes a recovery. *Ib.* 359.

WAIVER.

1. *Breach of the conditions of a lease; waiver of such breach*.—The acceptance by a landlord of the rents accruing after the breach of the conditions contained in a lease, with full knowledge of the breach, and of all the circumstances, is an affirmation that the contract of lease was still in force and was to continue, for the time for which the rent was paid and received; and the lessee can not be considered a trespasser during the time for which he paid rent. *Brooks v. Rogers*, 433.
2. *Same*.—The making of a contract by which the lessee released to the lessor a portion of the leased premises for a consideration which was to be credited upon subsequently accruing rent, and which was executed after the knowledge on the part of the lessor that the covenants of the lease were broken, is an affirmation of the subsistence of the lease at the time of such contract, and constitutes a waiver of the forfeiture, and right to re-enter for breach of the covenants of the lease prior to the execution of such contract. *Ib.* 433.
3. *Vendor's lien; waiver by recital in note for purchase-money*.—Although a purchaser's note, with surety, recites that it was given for the purchase-money of land, the vendor's lien is waived if this recital is made as a mere inducement to an agreement, also contained in said note, that the purchaser should have the right to pay off any lien which might exist on the land, and hold the amount so paid as a set-off against said note. *Hammitt v. Stricklin*, 618.
4. *Contract modified by subsequent contract; waiver*.—When, after the execution of a contract, by which a builder is to complete a house "ready for occupancy," within 60 days from the date of said contract, according to plans which do not require the finishing of the second story and the putting on of the last coat of paint, the owner, after the expiration of the 60 days, makes another contract with said builder to do the additional work for extra compensation, he will be held to have waived the original stipulation to complete the work within the specified time, and to have substituted a stipulation for the completion of the work within a reasonable time. *Cornish v. Suydam*, 620.

WAREHOUSE RECEIPTS.

1. *Warehouse receipts; not negotiable instruments.*—Section 1178 of the Code provides that “a receipt of a warehouseman, on which the words ‘not negotiable’ are not plainly written or stamped, may be transferred by the endorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified so far as to give validity to any pledge, lien or transfer made or created by such person.” *Held*, that warehouse receipts are made negotiable only in the sense that their regular transfer by endorsement has the effect of a manual delivery of the property specified in them; but are not guaranties of title, and not governed by the law-merchant. *Com. Bank v. Hurt*, 130.
2. *Same; unauthorized transfer can not vest title as against real owner.* A factor, to whom cotton has been shipped for sale, having stored the same in a warehouse, and obtained receipts therefor in his own name, can not by an unauthorized transfer of the receipts, make his pledgee's title to the cotton superior to that of the true owner. *Ib.* 130.
3. *Pledge of warehouse receipt; title acquired.*—Where a warehouse receipt given in the name of a factor for cotton stored by him recites the name of the owner, and is afterwards transferred by the factor as collateral security for a note, on which note is indorsed that such “cotton has been advanced upon . . . to its full value” by the factor, the pledgee in receiving the receipt has the equivalent of notice of the true state of the account between the owner and the factor, and becomes the purchaser of only such interest and claim the factor could assert. *Commercial Bank of Selma v. Lee*, 293.
4. *Same; not governed by section 1178 of Code.*—Such interest acquired with such notice, is in no sense the character of interest section 1178 of the Code intends to secure and protect in an endorsee of a warehouse receipt. *Ib.* 293.

WARRANT. See CRIMINAL LAW SUB-TITLE.

WATER COMPANIES.

1. *Action for money had and received; when not maintainable.*—If, in an action to recover from a water company, as money had and received, an amount paid under protest, in settlement of a water bill, it is shown that plaintiff allowed an unnecessary waste of more water than she actually paid for, at the usual and customary rates, there is no equity in plaintiff's claim, and she is not entitled to recover. *Capital City Water Co. v. Carey*, 539.

WILLS.

1. *Application for probate; nature of proceeding, and parties to contest.* An application for the probate of a will is a proceeding *in rem*, and though notice to the next of kin is required (Code, § 1987), they are not parties, unless they appear and contest, or actively engage in the litigation. *Reese v. Nolan*, 208.
2. *Same; parties to appeal, and practice.*—One of the next of kin, who, though notified, did not appear on the contest, can not sue out an appeal from the decree admitting the will to probate, nor join in an appeal sued out by the contestants; but, if he was not notified, he may propound his interest by petition to the court below, and, having then been made a party, may sue out an appeal. *Ib.* 208.

WILLS—CONTINUED.

3. *Same; notice to next of kin, and failure to give.*—The failure to give notice to one of the next of kin does not render the probate void, but is a mere irregularity, of which the others can not complain on error. *Ib.* 203.
4. *Same; reducing testimony of witnesses to writing, and recording it.* The statutory provision which requires that the testimony of the witnesses on the hearing shall be reduced to writing, subscribed by them, and recorded with the will in a book provided for the purpose (Code, § 1982), is directory merely, and a failure to comply strictly with it does not avoid the probate. Where the record shows, as here, that the subscribing witnesses were examined on the trial of the contest, and sets out the substance of their evidence, showing the due execution of the will, and the decree admitting the paper to probate, declaring that it has been duly proved, further orders the will and all the papers on file relating to it to be recorded,—this is a substantial compliance with the requirements of the statute. *Ib.* 203.

WITNESSES.

1. *Evidence; use of memoranda to refresh memory of witness.*—It is not permissible for a witness, against the objection of the adverse party, to use for the purpose of refreshing his memory, memoranda made a long time after the date of the transaction to which it referred. *Howell v. Carden*, 100.
2. *Recognizance of witness taken by justice of the peace; amount and surety.*—On the preliminary investigation of a criminal charge, a justice of the peace has authority to require a witness for the prosecution to enter into a recognizance in a greater sum than \$100 for his appearance in court to testify; but he can not require the witness to give surety for his appearance, when he is a non-resident, or resides more than fifty miles from the place at which the examination is had (Code, §§ 4292-94); yet, the obligation being joint and several (§ 4427), the principal is bound by it, through no recovery could be had against the surety. *State v. Calhoun*, 279.

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